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INSTITUTES  
OF  
COMMON AND STATUTE LAW.

BY  
JOHN B. MINOR, LL. D.,  
PROFESSOR OF COMMON AND STATUTE LAW IN THE UNIVERSITY OF  
VIRGINIA.

VOLUME I.

THE RIGHTS WHICH RELATE TO THE PERSON.

Second Edition, Revised and Corrected.



RICHMOND:  
PRINTED FOR THE AUTHOR.  
SOLD BY M. M<sup>c</sup>KENNIE & SON, UNIVERSITY OF VIRGINIA ;  
RANDOLPH & ENGLISH ; AND WEST, JOHNSTON, & CO., RICHMOND, VA.  
1876.

Entered according to Act of Congress, in the year 1876,

By JOHN B. MINOR,

In the Office of the Librarian of Congress, at Washington.

L 6782

NOV 28 1932

Printed by

WHITTET & SHEPPERSON,

Cor. 10th and Main Sts., Richmond, Va,

W.A. 9511 1932



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FORMER AND PRESENT PUPILS,  
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THE AUTHOR.



## PREFACE TO THE FIRST EDITION.

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No one can be more surprised than the author at the bulk and character which this work has assumed. It was undertaken with the purpose of presenting in print what the author had been accustomed, for many years, annually to exhibit on the blackboard: that is, a mere tabular analysis of part of his course of instruction in the Law Department of the University, and was expected not to exceed, at most, five or six hundred pages. Insensibly, however, the explanations connected with the successive heads of the analysis became more and more comprehensive, until what was designed to be a *Synopsis* turned out a *Commentary*.

One consequence of this unanticipated enlargement of the author's plan is that the title which he at first gave of "*Synopsis of Common and Statute Law*," has become inapplicable, and he finds himself reluctantly constrained to adopt another designation, more pretentious, perhaps, than he might otherwise have chosen, namely, "INSTITUTES OF COMMON AND STATUTE LAW." No one who takes the trouble to bestow ever so cursory a survey on the first volume will doubt that it is sufficiently *elementary* to merit such a title, however he may question the "institutional method" observed, and object to the propriety and perspicuity of the arrangement in the minuter details.

The author's *immediate* object has been, not to address himself to the legal profession at large, (whom, yet, he would like much to please and satisfy,) but to prepare a text-book, to aid and supplement his own oral instructions; and many years' experience, as a teacher of law, assures him that he is not mistaken in respect to the signal efficiency of the *analytical arrangement* which, with that view, he has adopted. Whether that analytical method, thus prominently and systematically employed, will be, to a like

extent, efficient with other teachers of the science of law, or with persons who pursue their studies privately, can only be determined by actual trial. The author is not sanguine that his legal brethren generally, if they condescend to look into his pages at all, will form a favorable opinion of the method in question, although he conceives that, if they will take the pains to find and to follow the clue to the expositions presented, they will discover that the book affords no bad medium for a rapid survey of topics which there may be no opportunity to explore in more elaborate treatises.

The work having been printed in instalments, for the use of the author's pupils, as his health and leisure enabled him to condense into some congruity the materials which he had collected, traces of occasional want of homogeneousness will be discerned ; but it is believed in nothing more important than the references to the statutes of Virginia, which, down to page 192 of the first volume, and page 496 of the second, are to the Code of 1860 and the subsequent Sessions Acts, whilst afterwards they are to the Code of 1873 and the Sessions Acts following.

The limits of the work have permitted no reference to the statutes of States other than Virginia. Indeed, the author is of opinion that it is not desirable to ply the student of the elements with various and conflicting statutory provisions ; and that it is essentially immaterial whether he learns the statute law of one State or another, provided he *learns it thoroughly*. When he has become perfectly master of the general statutes of any one State, a very short time,—a few weeks at farthest,—will suffice to acquaint him with the corresponding statutes of any other State more discriminatingly than if his attention had been confined to the latter exclusively, a proposition to support which, if any should doubt it, the author might vouch a cloud of witnesses from the ranks of his own pupils, who, in every State in the South and West, have abundantly tested its truth.

The reader who opens the volumes for the first time cannot fail to be struck, and perhaps will be repelled, by the very peculiar arrangement, which, though familiar enough to those who for the last thirty years have pursued their legal studies at the University of Virginia, requires explanation. The arrangement is designed to exhibit *to the eye*, on the page, not only the carefully digested

*order* of the propositions, but their *relative subordination* also, indicated by their standing more or less *to the right*. The most prominent propositions are designated by the Roman numerals I, II, III, &c., on the *extreme left* of the page; and then, as a guide to the reader, the intended position of the subordinate headings (designated by the Arabic numerals 1, 2, 3, &c.) is shown by small letters attached to the figures (1<sup>a</sup>, 1<sup>b</sup>, 1<sup>c</sup>, &c.). Thus, the subordinate heading *first* in importance and comprehensiveness is indicated by 1<sup>a</sup>, and the subsequent topics corresponding to that (being placed as nearly under it as possible) are designated as 2<sup>a</sup>, 3<sup>a</sup>, &c. So the next in subordination is represented by 1<sup>b</sup>, placed a little further to the right, and the subsequent corresponding heads (as nearly under 1<sup>b</sup> as possible) by 2<sup>b</sup>, 3<sup>b</sup>, &c.

If the reader will turn to the table of contents, which is arranged upon this analytical method, he will have little difficulty in understanding and following the plan, which, indeed, is only novel in the extent to which it has been carried.

It is but too obvious that this arrangement leads to a great loss of space on the page, but the author speaks with the authority of a very long experience when he avers that it contributes vastly to clearness and accuracy of apprehension on the part of the student. And with more experience in book-making, or even with the opportunity of frequent personal conference with the printer, both which advantages were denied to the author, much of the space lost might be saved.

The author's scheme, when he had in view only a skeleton analysis like Lord Hale's, as enlarged by Blackstone, was to follow in general the outlines of the latter writer's incomparable Commentaries. Had he meditated originally so voluminous a work as he has now partly completed, he would have ventured to deviate in many particulars from the analysis of Hale and Blackstone, as, indeed, in the detailed development of many subjects, especially such as presented themselves for discussion after his change of plan, he has actually done. Thus, to say nothing of other particulars, he would not have contented himself with the scanty synopsis he has offered of the English government, but would have accompanied it with some parallel exposition of the institutions of our own country, a popular and comprehensive view of which he takes to be no inconsiderable *desideratum*.

The plan which he has marked out contemplates four volumes (three besides the present), embracing the topics following:

Volume I. The Rights which concern or *relate to the Person*, with an introduction corresponding to that of Blackstone.

Volume II. The Rights which *relate to Things Real*,—that is, lands, and real property generally.

Volume III. The Rights which *relate to Things Personal*; and

Volume IV. The *Remedies for Wrongs*, including an exposition of the general Practice of the Law, and the subject of Pleading.

The author hopes to have the second volume fully printed in a few months, and the two other volumes in the course of one or two years.

UNIVERSITY OF VIRGINIA, *March*, 1875.

## PREFACE TO THE SECOND EDITION.

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THE appearance of a second edition of the first two volumes of this work after so brief an interval might seem to indicate a degree of favor which the performance has not attained, nor indeed has had an opportunity to achieve; for although not denied to those who sought for it, no attempt has been made to invite purchasers, nor has it as yet been *offered* to the general public at all. A reprint, however, having been made requisite by circumstances which need not be detailed, advantage has been taken of the occasion to revise the text, to make many corrections and some additions, and especially to put the whole in a more compact form, thereby lessening the bulk, and in a still greater ratio, the price.

The work having been received with more approbation than the author had allowed himself to expect, a larger edition is now ventured upon, the merits of which are submitted to the candid judgment of the profession.

UNIVERSITY OF VIRGINIA, *Sept.*, 1876.





# ANALYTICAL TABLE OF CONTENTS

## OF BOOK I.

---

	Page.
<b>HISTORICAL SUMMARY OF IMPORTANT EPOCHS IN THE LAW; W. C.</b>	<b>xxiii</b>
1 <sup>a</sup> . <i>Section i.</i> Summary of the most prominent Epochs in the Law of England,	xxiv
2 <sup>a</sup> . <i>Section ii.</i> Data touching the Chronology of English and American Law,	xxvii
<b>INTRODUCTION; W. C.</b>	
<b>I. <i>Section i.</i> The Study of the Law; W. C.</b>	
1 <sup>a</sup> . The utility of the study of the law to various classes of persons,	2
2 <sup>a</sup> . The causes of the disuse of the study of the common law at Oxford and Cambridge,	8
3 <sup>a</sup> . Reasons why the study of the law should be resumed at the English Universities,	17
4 <sup>a</sup> . Methods to facilitate the study of the law,	18
<b>II. <i>Section ii.</i> The Nature of Laws in general; W. C.</b>	
1 <sup>a</sup> . Definition of Law in its most general sense,	22
2 <sup>a</sup> . The several kinds of Law; W. C.	
1 <sup>b</sup> . The Divine Law,	22
2 <sup>b</sup> . Human Law; W. C.	
1 <sup>c</sup> . International Law,	22
2 <sup>c</sup> . Constitutional Law,	22
3 <sup>c</sup> . Municipal Law; W. C.	
1 <sup>d</sup> . Definition of Municipal Law,	22
2 <sup>d</sup> . The several parts of a Law, declaratory, directory, remedial, and vindicatory,	28
3 <sup>d</sup> . The obligation to obey the Laws,	28
4 <sup>d</sup> . The interpretation of Laws,	28
<b>III. <i>Section iii.</i> The Laws of England; W. C.</b>	
1 <sup>a</sup> . The <i>lex non scripta</i> , unwritten, or Common Law; W. C.	
1 <sup>b</sup> . Why called <i>lex non scripta</i> ,	30
2 <sup>b</sup> . The Rise and Original of the <i>lex non scripta</i> , or common law,	30
3 <sup>b</sup> . The several parts of the <i>lex non scripta</i> , or common law; W. C.	
1 <sup>c</sup> . General Customs,	31
2 <sup>c</sup> . Particular Customs,	32
3 <sup>c</sup> . Particular Laws; W. C.	
1 <sup>d</sup> . What particular laws are admitted as part of the <i>lex non scripta</i> ,	35
2 <sup>d</sup> . The several species of Courts wherein the civil and canon laws are permitted to be used,	37
3 <sup>d</sup> . The restraints in the employment of the civil and canon laws,	37

	Page.
2 <sup>a</sup> . The <i>lex scripta</i> , or Statute Law; W. C.	
1 <sup>b</sup> . How Statutes are enacted, . . . . .	37
2 <sup>b</sup> . The different kinds of Statutes, . . . . .	38
3 <sup>b</sup> . The rules to be observed with regard to the Construction of Statutes, as prescribed <i>by the common law</i> , . . . . .	39
4 <sup>b</sup> . Rules to be observed with regard to the Construction of Statutes, as prescribed by law in Virginia, . . . . .	41
3 <sup>a</sup> . The Law prevailing in Virginia; W. C.	
1 <sup>b</sup> . The law in Virginia previous to the Revolution of 1776, . . . . .	43
2 <sup>b</sup> . The law in Virginia since the Revolution; W. C.	
1 <sup>c</sup> . The laws enacted by the direct authority of the Common- wealth, . . . . .	44
2 <sup>c</sup> . The laws of the United States, . . . . .	44
IV. Section iv. The countries subject to the laws of England; W. C.	
1 <sup>a</sup> . The various countries <i>subject to the authority of England</i> , . . . . .	45
2 <sup>a</sup> . The territory immediately <i>subject to the laws of England</i> ; W. C.	
1 <sup>b</sup> . The High Seas, . . . . .	48
2 <sup>b</sup> . England, Wales, and Berwick; W. C.	
1 <sup>c</sup> . Ecclesiastical Divisions of the Territory of England, . . . . .	48
2 <sup>c</sup> . Civil Divisions of the Territory of England, . . . . .	49
THE OBJECTS OF THE COMMON AND STATUTE LAW; W. C.	
I. The Rights which concern or relate to the Person; W. C.	
1 <sup>a</sup> . Rights which concern or relate to the Person in respect to Natural Persons; W. C.	
1 <sup>b</sup> . CHAPTER I. The Absolute rights which relate to the Person in respect to Natural Persons; W. C.	
1 <sup>c</sup> . The Nature of Liberty, . . . . .	52
2 <sup>c</sup> . The Several Sorts of Absolute Rights; W. C.	
1 <sup>d</sup> . The Right of Personal Security, . . . . .	52
2 <sup>d</sup> . The Right of Personal Liberty, . . . . .	55
3 <sup>d</sup> . The Right of Private Property, . . . . .	59
4 <sup>d</sup> . The Right of Freedom of Conscience, . . . . .	59
3 <sup>c</sup> . The Solemn Declarations and Guards of Absolute Rights; W. C.	
1 <sup>d</sup> . Solemn Declarations and Guards of Absolute Rights in England, . . . . .	60
2 <sup>d</sup> . Solemn Declarations and Guards of Absolute Rights in Virginia, . . . . .	62
2 <sup>b</sup> . Relative Rights which concern the Person in respect to Natural Persons; W. C.	
1 <sup>c</sup> . Rights which concern Persons in Public Relations; W. C.	
1 <sup>d</sup> . Rights which concern Persons in the Relation of Magis- trates; W. C.	
1 <sup>e</sup> . Supreme Magistrates; W. C.	
1 <sup>f</sup> . CHAPTER III. The Supreme Legislature in England, or Parliament, . . . . .	67
2 <sup>f</sup> . CHAPTER III. The Supreme Executive in England, or the King; W. C.	
1 <sup>g</sup> . The Title to the Crown, . . . . .	74
2. CHAPTER IV. The King's Royal Family, . . . . .	75
3 <sup>g</sup> . CHAPTER V. The Councils belonging to the King, . . . . .	76
4 <sup>g</sup> . CHAPTER VI. The King's Duties, . . . . .	78

	Page.
5 <sup>s</sup> . CHAPTER VII. The King's Prerogative, . . .	78
6 <sup>s</sup> . CHAPTER VIII. The King's Revenue, . . .	83
2 <sup>e</sup> . CHAPTER IX. Subordinate Magistrates; W. C.	
1 <sup>f</sup> . The Sheriff; W. C.	
1 <sup>s</sup> . The Antiquity and Original of the office of Sheriff,	91
2 <sup>s</sup> . The Mode of Appointment and Removal of Sheriffs, and of securing their fidelity in office, . . .	91
3 <sup>s</sup> . The Duties of Sheriff, . . .	94
4 <sup>s</sup> . The Assistants employed by the Sheriff, . . .	96
2 <sup>f</sup> . The Coroner; W. C.	
1 <sup>s</sup> . Antiquity and Original of the office of Coroner,	100
2 <sup>s</sup> . Mode of Appointment and Removal of Coroners, and of securing their fidelity in office, . . .	101
3 <sup>s</sup> . Duties of Coroner, . . .	102
4 <sup>s</sup> . Assistants whom Coroner may employ, . . .	105
3 <sup>f</sup> . Justices of the Peace; W. C.	
1 <sup>s</sup> . Antiquity and Original of Justices of the Peace, . . .	105
2 <sup>s</sup> . Mode of Appointment and Removal of Justices of the Peace, and of securing their fidelity in office, . . .	106
3 <sup>s</sup> . Duties of a Justice of the Peace, . . .	108
4 <sup>f</sup> . Constables; W. C.	
1 <sup>s</sup> . Antiquity and Original of the office of Constable,	109
2 <sup>s</sup> . Mode of Appointment and Removal of Constables, and of securing their fidelity in office, . . .	110
3 <sup>s</sup> . Duties of a Constable, . . .	112
5 <sup>f</sup> . Surveyors of Highways; W. C.	
1 <sup>s</sup> . Antiquity and Original of the office of Surveyor of Highways, . . .	113
2 <sup>s</sup> . Mode of Appointment and Removal of Surveyors of Highways, and of securing their fidelity in office, . . .	114
3 <sup>s</sup> . Duties of Surveyors of Highways, . . .	115
6 <sup>f</sup> . Overseers of the Poor; W. C.	
1 <sup>s</sup> . Antiquity and Original of the office of Overseer of the Poor, . . .	121
2 <sup>s</sup> . Mode of Appointment, Removal, and securing the fidelity of Overseers of the Poor, . . .	122
3 <sup>s</sup> . Duties of Overseers of the Poor, . . .	123
7 <sup>f</sup> . Escheators; W. C.	
1 <sup>s</sup> . Antiquity and Original of the office of Escheator,	128
2 <sup>s</sup> . Mode of Appointment and Removal of Escheators, and securing their fidelity in office, . . .	130
3 <sup>s</sup> . Duties of Escheator, . . .	131
8 <sup>f</sup> . Supervisors, . . .	133
2 <sup>d</sup> . CHAPTER X. Rights which concern the Person in the Relation of People; W. C.	
1 <sup>e</sup> . The Doctrine of Allegiance, . . .	134
2 <sup>e</sup> . The different classes of People in a Country; W. C.	
1 <sup>f</sup> . The different classes of People in England, as Aliens, &c., . . .	137
2 <sup>f</sup> . The different classes of People in Virginia; W. C.	
1 <sup>s</sup> . Aliens, . . .	138
2 <sup>s</sup> . Citizens; W. C.	

	Page.
1 <sup>h</sup> . Persons who are or may be Citizens, by right of Birth, . . . . .	138
2 <sup>h</sup> . Naturalized Citizens, . . . . .	139
3 <sup>e</sup> . The Rights of the People as Aliens or Citizens; W. C.	
1 <sup>f</sup> . Political Rights, . . . . .	141
2 <sup>f</sup> . Rights of Property, . . . . .	142
4 <sup>e</sup> . CHAPTER XI. The several classes of the <i>people of England</i> ; W. C.	
1 <sup>f</sup> . The Clergy, . . . . .	148
2 <sup>f</sup> . CHAPTER XII. The Laity; W. C.	
1 <sup>g</sup> . The Civil State, . . . . .	153
2 <sup>g</sup> . CHAPTER XIII. The Military State, . . . . .	156
3. The Maritime State, . . . . .	159
2 <sup>c</sup> . CHAPTER XIV. The Private Relations, and Rights and Duties belonging thereto; W. C.	
1 <sup>d</sup> . Relation of Master and Servant; W. C.	
1 <sup>e</sup> . Definition of Master and Servant, . . . . .	161
2 <sup>e</sup> . The Several Classes of Servants; W. C.	
1 <sup>f</sup> . Slaves; W. C., . . . . .	161
1 <sup>g</sup> . Origin of Slavery in general, . . . . .	162
2 <sup>g</sup> . Origin of Slavery in Virginia, its justification, and its history there, . . . . .	163
3 <sup>g</sup> . Slavery in its relations to the world; W. C.	
1 <sup>h</sup> . The African Slave-trade, . . . . .	176
2 <sup>h</sup> . Effect of Slave's going to another country, where Slavery does not exist, supposing him to return to the Slave domicil, . . . . .	177
3 <sup>h</sup> . Liability for seizing or harboring a Slave, or for his price, where Slavery is lawful, the action being brought where Slavery is unlawful, . . . . .	179
4 <sup>h</sup> . Liability of a Master to pay wages to a Slave who continues to serve him, <i>without contract</i> , in a country where Slavery is not lawful, . . . . .	179
5 <sup>h</sup> . Effect of contract to render <i>perpetual service</i> , . . . . .	179
4 <sup>g</sup> . Who shall be deemed a <i>negro or colored person</i> , in Virginia, . . . . .	179
2 <sup>f</sup> . Menial Servants, . . . . .	180
3 <sup>f</sup> . Apprentices; W. C. . . . .	
1 <sup>g</sup> . Who are Apprentices, . . . . .	180
2 <sup>g</sup> . Mode of binding Apprentices, . . . . .	180
3 <sup>g</sup> . Obligation of Master, Apprentice, and Parent, &c., respectively, and Rights of Master, . . . . .	183
4 <sup>g</sup> . Authority of Master over Apprentice, . . . . .	185
5 <sup>g</sup> . Assignment by Master of indentures of Apprenticeship, . . . . .	186
6 <sup>g</sup> . Adjustment of Controversies between Master and Apprentice, . . . . .	186
7 <sup>g</sup> . Punishment for harboring Apprentice, and for his Desertion, . . . . .	187
8 <sup>g</sup> . Dissolution of contract of Apprenticeship, . . . . .	187
4 <sup>f</sup> . Laborers, . . . . .	188
5 <sup>f</sup> . Stewards, Bailiffs, Factors, Agents, &c., . . . . .	188

	Page.
3 <sup>o</sup> . Manner in which the relation of service affects Master and Servant, respectively; W. C.	
1 <sup>f</sup> . Relation of Master and Servant depends on Contract; W. C.	
1 <sup>g</sup> . Mode of entering into Contract of Service,	189
2 <sup>g</sup> . Effect of Contract of Hiring for an <i>indefinite time</i> ,	189
3 <sup>g</sup> . Effect of <i>entire Contract</i> of Service,	190
4 <sup>g</sup> . Effect upon Wages of Sickness of Servant,	191
5 <sup>g</sup> . Dissolution of Contract of Service,	191
6 <sup>g</sup> . Effect on Contract of Service of Marriage of female Servant,	194
7 <sup>g</sup> . Authority of Master over Servant,	194
8 <sup>g</sup> . Obligation of Master in respect to Servant,	194
2 <sup>f</sup> . Peculiar Privileges of Apprentice in England,	194
3 <sup>f</sup> . Doctrine touching homicide of Masters by Servants,	197
4 <sup>f</sup> . Obligation of Master touching testimonials to Servant's Character,	197
5 <sup>f</sup> . Doctrine touching liability of Servant to Master,	198
6. Doctrine touching Servant's dealing for his own benefit, with the subject of the Agency,	200, 222
4 <sup>o</sup> . Manner in which strangers may be affected by the relation of Master and Servant; W. C.	
1 <sup>f</sup> . Doctrine touching the right of mutual personal Defence, and of Maintenance of Suits, as between Master and Servant,	200
2 <sup>f</sup> . Doctrine touching seducing away, or retaining another's servant,	201
3 <sup>f</sup> . Doctrine touching <i>personal torts</i> done to Servants,	201
4 <sup>f</sup> . Doctrine touching contracts made and acts done by Servant, in connexion with his Employment; W. C.	
1 <sup>g</sup> . Doctrine touching <i>Contracts</i> made by Servant, in behalf of his Master,	202
2 <sup>g</sup> . Doctrine touching <i>torts</i> committed by Servants in connexion with their Employments,	218
5 <sup>o</sup> . Doctrine touching the Termination of the relation of <i>Master and Servant</i> ; W. C.	
1 <sup>f</sup> . Termination of Servant's Authority by <i>express Revocation</i> ,	223
2 <sup>f</sup> . Termination of Servant's Authority <i>by his death or that of the Master</i> ,	224
3 <sup>f</sup> . Termination of Servant's Authority by a <i>change in the condition</i> of the Master, <i>e. g.</i> , Bankruptcy, &c.,	226
4 <sup>f</sup> . Termination of Servant's Authority by the Completion of the Business, or by the lapse of time prescribed,	227
6 <sup>o</sup> . Doctrine touching liability of Master where Government is concerned; W. C.	
1 <sup>f</sup> . Liability of Government for tortious acts and defaults of its Servants,	227
2 <sup>f</sup> . Liability of Superior Government-officer for the act or default of his Subordinate,	228
3 <sup>f</sup> . Liability of a Municipal Corporation for the acts and defaults of its Servants,	229

	Page.
7 <sup>e</sup> . Doctrine touching the liability of Employer for the acts and defaults of a <i>Contractor</i> ,	229
8 <sup>e</sup> . Doctrine touching the liability of the owner of Real property for its use for hurtful Purposes,	230
2 <sup>d</sup> . CHAPTER XV. The relation of Husband and Wife; W. C.	
1 <sup>e</sup> . Definition and Character of Marriage,	230
2 <sup>e</sup> . Method of Contracting Marriage; W. C.	
1 <sup>f</sup> . Willingness of Parties to Contract,	231
2 <sup>f</sup> . Capacity of Parties to Contract; W. C.	
1 <sup>g</sup> . Doctrine in England as to Disabilities to Contract Marriage; W. C.	
1 <sup>h</sup> . Canonical Impediments,	232
2 <sup>h</sup> . Legal or Civil Disabilities,	237
2 <sup>g</sup> . Doctrine in Virginia touching <i>Capacity to Contract Marriage</i> ; W. C.	
1 <sup>h</sup> . Impediments which render a Marriage <i>Voidable</i> in Virginia,	239
2 <sup>h</sup> . Disabilities which in Virginia render the Marriage <i>Void per se</i> ,	241
3 <sup>f</sup> . Actual Contract of Marriage; W. C.	
1 <sup>g</sup> . Contract of Actual Marriage <i>in presenti</i> ; W. C.	
1 <sup>h</sup> . The Circumstances necessary to Actual Marriage at Common Law,	242
2 <sup>h</sup> . The Circumstances made necessary to Marriage by Statute in England,	243
3 <sup>h</sup> . The Circumstances prescribed by Statute in Virginia,	243
4 <sup>h</sup> . The effect of Foreign Marriages,	247
5 <sup>h</sup> . The Proof to be made of Marriage,	249
2 <sup>g</sup> . Contract to Marry <i>in futuro</i> ,	249
3 <sup>e</sup> . Modes whereby Marriage is dissolved; W. C.	
1 <sup>f</sup> . Death,	253
2 <sup>f</sup> . Divorce; W. C.	
1 <sup>g</sup> . The Several Kinds of Divorce,	253
2 <sup>g</sup> . The Causes for the Several Kinds of Divorce; W. C.	
1 <sup>h</sup> . Causes for the Several Kinds of Divorce in England,	254
2 <sup>h</sup> . Causes for the Several Kinds of Divorce in Virginia; W. C.	
1 <sup>i</sup> . The Causes for Divorce <i>a mensa et toro</i> in Virginia,	259
2 <sup>i</sup> . The causes for Divorce <i>a Vinculo Matrimonii</i> in Virginia,	261
3 <sup>g</sup> . The Courts charged with the Cognizance of Divorce Causes,	266
4 <sup>g</sup> . The Effects of Divorce; W. C.	
1 <sup>h</sup> . The Effects of Divorce in England,	271
2 <sup>h</sup> . The Effects of Divorce in Virginia,	274
5 <sup>g</sup> . Doctrine touching Foreign Sentences of Divorce; W. C.	
1 <sup>h</sup> . Doctrine in England,	279
2 <sup>h</sup> . Doctrine in Virginia,	279
6 <sup>g</sup> . Sundry Matrimonial Causes besides Divorce; W. C.	
1 <sup>h</sup> . What are such Matrimonial Causes,	280



	Page.
2 <sup>h</sup> . The Courts in which such Causes are Cognizable,	283
4 <sup>e</sup> . The Legal Consequences of Marriage; W. C.	
1 <sup>f</sup> . Effect of Marriage as <i>between Husband and Wife themselves</i> ; W. C.	
1 <sup>g</sup> . Effect of Marriage <i>in respect to the Persons</i> of Husband and Wife,	284
2 <sup>g</sup> . Effect of Marriage <i>in respect to the Property</i> of the Parties; W. C.	
1 <sup>h</sup> . Effect of Marriage with regard to Contracts and other Transactions between Husband and Wife, <i>occurring before Marriage</i> ,	289
2 <sup>h</sup> . Effect of Marriage with regard to Contracts, &c., <i>between Husband and Wife, occurring during coverture</i> ; W. C.	
1 <sup>i</sup> . Conveyances by Husband to Wife, and <i>vice versa</i> ,	291
2 <sup>i</sup> . Executory Contracts as between Husband and Wife, <i>during coverture</i> ,	295
3 <sup>i</sup> . Testamentary Dispositions by either Consort in favor of the other,	295
4 <sup>i</sup> . Marriage Settlements,	295
3 <sup>h</sup> . Effect of Marriage on the Property of each Consort, in regard to the other; W. C.	
1 <sup>i</sup> . The Wife's ante-nuptial Conveyances in fraud of the Husband's Marital Rights,	298
2 <sup>i</sup> . The Interest conferred by Marriage upon the Husband and Wife respectively in the Property of the other; W. C.	
1 <sup>k</sup> . Husband's interest in Wife's Property; W. C.	
1 <sup>i</sup> . Husband's interest in Wife's <i>Chattels</i> ,	299
2 <sup>i</sup> . Husband's interest in Wife's <i>Freehold Lands</i> ,	311
2 <sup>k</sup> . Wife's interest in Husband's Property; W. C.	
1 <sup>i</sup> . Wife's interest in Husband's <i>Chattels</i> ,	313
2 <sup>i</sup> . Wife's interest in Husband's <i>Lands</i> ,	315
3 <sup>k</sup> . *Wife's Separate Property,	316
4 <sup>k</sup> . Husband and Wife Tenants by Entireties,	333
2 <sup>f</sup> . Effect of Marriage <i>as to third Persons</i> ; W. C.	
1 <sup>g</sup> . Effect <i>as to third Persons</i> , of the Wife's ante-nuptial Contracts,	335
2 <sup>g</sup> . Effect of Contracts made by the Wife, <i>during coverture</i> ; W. C.	
1 <sup>h</sup> . Effect of Wife's Contracts during Coverture, <i>as respects herself</i> ,	336
2 <sup>h</sup> . Effect of Wife's Contracts during Coverture, <i>as respects the Husband</i> ,	341
3 <sup>g</sup> . Doctrine touching the <i>Husband's Liability for the Wife's Torts</i> ,	345
4 <sup>g</sup> . Doctrine touching Suits <i>by and against Husband and Wife</i> ; W. C.	
1 <sup>h</sup> . Actions by Husband and Wife,	347
2 <sup>h</sup> . Actions against Husband and Wife,	357
3 <sup>h</sup> . Suits as between <i>Husband and Wife</i> , or <i>by or against Wife alone</i> , in the courts of equity,	363

	Page.
5 <sup>g</sup> . Doctrine touching Liability of Married Women to Punishment for Crime, . . . . .	365
6 <sup>g</sup> . Doctrine touching Husband and Wife <i>being Witnesses, the one for the other</i> , . . . . .	366
3 <sup>f</sup> . Contrast of the Sexes, <i>in respect to their several Rights and Privileges</i> ; W. C.	
1 <sup>g</sup> . Difference in respect of <i>Crimes</i> , . . . . .	367
2 <sup>g</sup> . Difference in respect of <i>Civil Rights</i> , . . . . .	369
3 <sup>d</sup> . CHAPTER XVI. Relation of Parent and Child; W. C.	
1 <sup>e</sup> . Legitimate Children; W. C.	
1 <sup>f</sup> . Definition of a <i>Legitimate Child</i> , . . . . .	374
2 <sup>f</sup> . Duties of Parents to Legitimate Children; W. C.	
1 <sup>g</sup> . Duty of Maintenance, . . . . .	374
2 <sup>g</sup> . Duty of Protection, . . . . .	380
3 <sup>g</sup> . Duty of Education, including sketch of Public School System in Virginia, . . . . .	381
3 <sup>f</sup> . Powers of Parents as to Legitimate Children; W. C.	
1 <sup>g</sup> . Custody of Child's Person, and Power of correction, . . . . .	397
2 <sup>g</sup> . Parent's power to consent to the Marriage of a minor child, . . . . .	402
3 <sup>g</sup> . Power and control of Parents over minor child's estate, . . . . .	403
4 <sup>g</sup> . Parent's Power to delegate his authority, . . . . .	404
5 <sup>g</sup> . Period when Parent's Power terminates, . . . . .	405
4 <sup>f</sup> . Duties of legitimate children to Parents, . . . . .	405
2 <sup>e</sup> . Illegitimate Children or Bastards; W. C.	
1 <sup>f</sup> . Definition of an illegitimate child, or Bastard, . . . . .	407
2 <sup>f</sup> . Duty of Parents to Bastards; W. C.	
1 <sup>g</sup> . Mode of compelling Father to support his Bastard child, . . . . .	412
2 <sup>g</sup> . Custody of Bastard Children, . . . . .	416
3 <sup>f</sup> . Rights and Incapacities of Bastards; W. C.	
1 <sup>g</sup> . Rights and Incapacities of Bastards at common law; W. C.	
1 <sup>h</sup> . Rights of Bastards at common law, . . . . .	416
2 <sup>h</sup> . Incapacities of Bastards at common law, . . . . .	419
2 <sup>g</sup> . Rights and Incapacities of Bastards in Virginia, . . . . .	420
4 <sup>d</sup> . CHAPTER XVII. Relation of Guardian and Ward; W. C.	
1 <sup>e</sup> . The different kinds of Guardians, the Modes of their Appointment severally, and their Power and Duty; W. C.	
1 <sup>f</sup> . The different kinds of Guardians, and Modes of their Appointment severally; W. C.	
1 <sup>g</sup> . Guardian by Nature, . . . . .	423
2 <sup>g</sup> . Guardian for Nurture, . . . . .	424
3 <sup>g</sup> . Guardian in Chivalry, . . . . .	424
4 <sup>g</sup> . Guardian in Socage, . . . . .	425
5 <sup>g</sup> . Guardian by Election, . . . . .	426
6 <sup>g</sup> . Guardian appointed by the Chancery Court, . . . . .	427
7 <sup>g</sup> . Guardian by appointment of Ecclesiastical Court, . . . . .	429
8 <sup>g</sup> . Guardian under the Statute 4 & 5 Ph. & Mar. c. 8, . . . . .	429

	Page.
9 <sup>g</sup> . Guardian appointed by Father, or <i>Testamentary</i> , or <i>Statutory</i> Guardian, . . . . .	430
10 <sup>g</sup> . Guardian by the Custom of Particular Places, . . . . .	431
11 <sup>g</sup> . Guardian <i>ad litem</i> , . . . . .	432
2 <sup>f</sup> . The Circumstances under which the different kinds of Wardship occur, . . . . .	433
3 <sup>f</sup> . The Powers and Duties of Guardian; W. C.	
1 <sup>g</sup> . Custody of Ward's person, and care of his Education, . . . . .	436
2 <sup>g</sup> . Care and Management of Ward's estate, . . . . .	439
4 <sup>f</sup> . Guardian's Accounts and Allowances; W. C.	
1 <sup>g</sup> . General doctrine of Accountability of Guardians, . . . . .	444
2 <sup>g</sup> . The particulars for which a Guardian is Accountable; W. C.	
1 <sup>h</sup> . Ward's Estate which did, or might have, come to guardian's hands, . . . . .	446
2 <sup>h</sup> . Losses arising from Guardian's Neglect, &c., . . . . .	446
3 <sup>h</sup> . Losses arising from Misconduct of Co-guardian . . . . .	449
3 <sup>g</sup> . Means provided in Virginia to compel the prompt and accurate settlement of Guardian's Accounts; W. C.	
1 <sup>h</sup> . The Commissioner of Accounts, . . . . .	451
2 <sup>h</sup> . The Return of the Inventory, and Account of Sales by Guardian, . . . . .	452
3 <sup>h</sup> . The <i>Annual Settlement</i> of Guardian's Accounts, . . . . .	452
4 <sup>g</sup> . Mode of stating Guardian's Accounts; W. C.	
1 <sup>h</sup> . The General Principles regulating the settlement of Guardian's Accounts, . . . . .	454
2 <sup>h</sup> . The mode of charging <i>Interest</i> , in respect of Guar- dians, . . . . .	455
3 <sup>h</sup> . Allowances to Guardians, . . . . .	456
4 <sup>h</sup> . Doctrine touching the Validity of a Guardian's pri- vate settlement with his Ward, &c., . . . . .	461
5 <sup>h</sup> . Doctrine as to the Guardian's own Examination be- fore the Commissioner, . . . . .	461
6 <sup>h</sup> . Doctrine as to the production of Books and Vouch- ers, . . . . .	462
7 <sup>h</sup> . Mode of proceeding by Ward against Guardian, and Limitation thereto, . . . . .	463
8 <sup>h</sup> . Form of stating Guardian's Accounts, . . . . .	464
5 <sup>f</sup> . Termination of the Wardship, . . . . .	471
2 <sup>e</sup> . Doctrine touching the Capacities and Incapacities of In- fants; W. C.	
1 <sup>f</sup> . Ages at which Infants are capable for divers pur- poses, . . . . .	471
2 <sup>f</sup> . The precise time when an Infant attains his Age, . . . . .	472
3 <sup>f</sup> . Doctrine touching the Privileges and Disabilities of Infants; W. C.	
1 <sup>g</sup> . Doctrine touching an Infant's Suing or being Sued, . . . . .	473
2 <sup>g</sup> . Doctrine touching Privileges and Disabilities of In- fants in relation to Property and Contracts; W. C.	
1 <sup>h</sup> . Doctrine touching the Privileges and Disabilities of Infants in relation to <i>the Disposition of Property</i> , . . . . .	477

	Page.
2 <sup>b</sup> . Doctrine touching the Privileges and Disabilities of Infants in relation to <i>Contracts Executory</i> ; W. C.	
1 <sup>i</sup> . What Contracts of Infants are <i>Valid, Void, and Voidable</i> , respectively,	478
2 <sup>i</sup> . What <i>confirmation</i> is required and sufficient of such as are <i>Voidable</i> ,	488
3 <sup>i</sup> . The Acts for which Infants are liable, notwithstanding their Infancy,	495
2 <sup>a</sup> . CHAPTER XVIII. The Rights which relate to Artificial Persons, or Corporations; W. C.	
1 <sup>b</sup> . The Origin and Nature of Corporations,	498
2 <sup>b</sup> . The several kinds of Corporations; W. C.	
1 <sup>c</sup> . The several kinds of Corporations, according to the <i>number of Persons</i> which compose them; W. C.	
1 <sup>d</sup> . Corporations Aggregate,	501
2 <sup>d</sup> . Corporations Sole,	502
2 <sup>c</sup> . The several kinds of Corporations as <i>Government is or is not concerned therein</i> ; W. C.	
1 <sup>d</sup> . Public Corporations,	503
2 <sup>d</sup> . Private Corporations,	503
3 <sup>c</sup> . The several kinds of Corporations according to the <i>Object and Design thereof</i> ; W. C.	
1 <sup>d</sup> . Ecclesiastical Corporations,	504
2 <sup>d</sup> . Lay Corporations; W. C.	
1 <sup>e</sup> . Civil Corporations; W. C.	
1 <sup>f</sup> . The Nature of a Civil Corporation,	504
2 <sup>f</sup> . Advantages of a Corporation in connexion with business purposes,	505
3 <sup>f</sup> . Limited Partnerships,	506
2 <sup>e</sup> . Eleemosynary Corporations,	507
3 <sup>b</sup> . The Creation and Organization of Corporations; W. C.	
1 <sup>c</sup> . The Creation of Corporations; W. C.	
1 <sup>d</sup> . The Mode of creating Corporations; W. C.	
1 <sup>e</sup> . Mode of creating Corporations in England,	508
2 <sup>e</sup> . Mode of creating Corporations in Virginia,	509
2 <sup>d</sup> . The Circumstances which accompany the Creation of a Corporation; W. C.	
1 <sup>e</sup> . Persons to be Incorporated,	511
2 <sup>e</sup> . The Name of a Corporation,	511
3 <sup>e</sup> . The Place of a Corporation; W. C.	
1 <sup>f</sup> . Place of a Corporation, as to <i>Imposition of Taxes</i> ,	514
2 <sup>f</sup> . Place of a Corporation, as respects its capacity to <i>conduct business elsewhere</i> ,	517
3 <sup>f</sup> . Place of a Corporation, as respects its capacity to Sue and be Sued, when it depends on <i>Residence or Citizenship</i> ,	519
2 <sup>c</sup> . The Organization of Corporations; W. C.	
1 <sup>d</sup> . The Acceptance of the Charter by the Corporators,	520
2 <sup>d</sup> . Proof of Acceptance of Charter,	520
3 <sup>d</sup> . Attributes or Incidents of a Corporation at common law,	521
4 <sup>d</sup> . Admission and Election of Members and Officers,	523
5 <sup>d</sup> . Disfranchisement of Members, and Amotion of Officers,	527

	Page.
6 <sup>d</sup> . Subscription for, and Assessment upon Shares in Joint-Stock Companies, . . . . .	527
4 <sup>b</sup> . The Powers and Modes of Action of Corporations; W. C.	
1 <sup>c</sup> . The Modes of Action of Corporations; W. C.	
1 <sup>d</sup> . Time of Meeting, . . . . .	531
2 <sup>d</sup> . Place of Meeting, . . . . .	532
3 <sup>d</sup> . Notice of meeting, . . . . .	532
4 <sup>d</sup> . The Persons who should compose the Meeting, and the Rules which should govern their Action, . . . . .	533
2 <sup>c</sup> . The Powers of Corporations; W. C.	
1 <sup>d</sup> . Power to have Perpetual Succession, . . . . .	534
2 <sup>d</sup> . Power to have a Common Seal, and to change it at pleasure, . . . . .	535
3 <sup>d</sup> . Power to Contract and be Contracted with; W. C.	
1 <sup>e</sup> . The Modes in which a Corporation may Contract, . . . . .	538
2 <sup>e</sup> . With whom and in what Manner a Corporation Contracts, . . . . .	538
3 <sup>e</sup> . What Contracts a Corporation may make, . . . . .	538
4 <sup>e</sup> . Appointment of Agent by a Corporation, . . . . .	541
4 <sup>d</sup> . Power to take, hold, transmit in succession, and alienate property as natural persons may, . . . . .	547
5 <sup>d</sup> . Power to make By-laws, . . . . .	553
6 <sup>d</sup> . Power to Sue and be Sued; W. C.	
1 <sup>e</sup> . Doctrine as to the Capacity of Corporations to Sue and be Sued, . . . . .	555
2 <sup>e</sup> . Mode of proceeding in Suits by or against Corporations; W. C.	
1 <sup>f</sup> . Mode of proceeding in Suits where the <i>Corporation is Plaintiff</i> , . . . . .	562
2 <sup>f</sup> . Mode of proceeding where a Corporation is Defendant; W. C.	
1 <sup>g</sup> . The place where in Virginia Suit is to be instituted against a Corporation, . . . . .	564
2 <sup>g</sup> . The Process to be employed to commence a Suit or Action against a Corporation, . . . . .	564
3 <sup>g</sup> . Mode of serving Process on a Corporation, . . . . .	565
4 <sup>g</sup> . Proceeding in Suits against Corporations, after Process served, . . . . .	568
7 <sup>d</sup> . Power to remove Members and Officers, . . . . .	570
3 <sup>c</sup> . Disabilities of Corporations, . . . . .	570
5 <sup>b</sup> . The Relation of Members to the Corporation; W. C.	
1 <sup>c</sup> . Personal Liability of Members for the <i>Contracts and torts</i> of the Corporation, . . . . .	572
2 <sup>c</sup> . Nature and transfer of Stock in <i>Joint-Stock Corporations</i> , . . . . .	573
6 <sup>b</sup> . The Visitation of Corporations, . . . . .	573
7 <sup>b</sup> . Judicial Proceedings to restrain and direct Corporations in the exercise of their functions and franchises; W. C.	
1 <sup>c</sup> . Writ of <i>Mandamus</i> , . . . . .	575
2 <sup>c</sup> . Writ of <i>Quo Warranto</i> , . . . . .	575
8 <sup>b</sup> . Dissolution of Corporations; W. C.	
1 <sup>c</sup> . The Consequences of the Dissolution of a Corporation, . . . . .	576
2 <sup>c</sup> . Modes of Dissolving Corporations; W. C.	

	Page.
1 <sup>d</sup> . Modes of dissolving Public Corporations ; W. C.	
1 <sup>e</sup> . Dissolution of a Corporation by <i>Act of Legislature</i> ,	578
2 <sup>e</sup> . Dissolution of a Corporation by the <i>loss of all its Mem-</i> <i>bers</i> , or of an <i>integral part of itself</i> , by death or other- wise,	579
3 <sup>e</sup> . Dissolution of a Corporation by the <i>Surrender of its</i> <i>Franchise to be a Corporation</i> ,	580
4 <sup>e</sup> . Dissolution of a Corporation by <i>Forfeiture</i> , for <i>Non-user</i> or <i>Mis-user</i> of its Franchises,	582
2 <sup>d</sup> . Modes of dissolving Private Corporations,	584

# HISTORICAL SUMMARY

## OF THE

### MOST IMPORTANT EPOCHS IN THE LAW.

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IN one of the best, as it is also one of the most interesting, chapters on his Commentaries, Sir William Blackstone, by way of supplement to his work, presents an historical review of the most remarkable changes that have happened in the law of England; thus marking out some outlines of English juridical history, by taking a chronological survey of the state of those laws, and their successive mutations. To this elegant summary the student's attention is invited the more earnestly, not only because of its intrinsic value, but because it first suggested, and constitutes the basis, (as Mr. Reeves himself states,) of that very admirable performance, "The History of the English Law, from the time of the Saxons to the accession of Elizabeth," by John Reeves, Esq., to which frequent reference is made in the following pages of this work. (1 Reeves' Hist. E. L., Preface, v.)

The several periods under which Blackstone considers the state of the legal polity of England are the six following, namely:

1. From the earliest times to the Norman Conquest, (A. D. 1066).

2. From the Norman Conquest to the reign of Edward I, the English Justinian, as he is fondly styled, (A. D. 1272).

3. From thence to the Reformation, *temp.* Henry VIII, (A. D. 1509).

4. From the Reformation to the restoration of King Charles II, (A. D. 1660).

5. From thence to the Revolution under William, Prince of Orange, (A. D. 1688); and



6. From the Revolution to the date of the Commentaries, (A. D. 1765,) somewhat more than a century ago. (4 Bl. Com. 407, & seq.)

Blackstone reserves this outline of juridical history for the final chapter of his great work; and it is not without considerable hesitation that a somewhat corresponding abstract is here exhibited at the very beginning of these Institutes; nor has such a departure from so illustrious an example been adventured upon save after a long experience, with successive classes of beginners, of its utility.

It is proposed, in the first section which follows, to do no more than present a tabular outline of the most note-worthy occurrences in the law of England, without any discussion thereof; and to follow that summary, in the second section, with a more detailed, but still a mere tabular, exposition chronologically, of the specially interesting incidents connected with the juridical history of our own, as well as of the mother country.

The student is expected to *learn the first section thoroughly*, and to make himself, by degrees, familiar with the outline of the second, to which it is hoped he will constantly refer during the persual of the ensuing volumes.

## SECTION i.

### SUMMARY OF THE MOST PROMINENT EPOCHS IN THE LAW OF ENGLAND.

A. D.

- 890. 19 Alfred. The local customs of the *Heptarchy*, collected and digested by Alfred into one general Code, called *Dome-book* (Dom-boc), or *Liber Judicialis*; which was still extant in the reign of Edward IV, (A. D. 1461), but is now lost.
- 1041. 1 Edward *the Confessor*. *Re-compilation* of Alfred's Laws, which, in the lapse of a century and a half, had become greatly corrupted by local usages.
- 1066. 1 William I. *Norman Conquest*; followed (about A. D. 1086), by the introduction into England of the *Feudal law*, in its utmost rigor, by consent, too, of the *Wittenagemote*, *Commune Concilium*, or Parliament; thereby attaching to lands, amongst several other very oppressive incidents, an *absolute inalienability*, without the consent of the lord.
- 1138. 3 Stephen. Introduction into England, by the Ecclesiastics, of the *Roman Imperial Law*, to the study of which the discovery of a copy of Justinian's Pandects, at Amalfi, in Italy, about eight years before, after they had been lost to the

A. D.

world for near five centuries, had given a powerful impulse.

1215. 16 John. *Magna Charta* ratified by John, upon the demand of his Barons, at *Runnimeade*, on the Thames, some miles above London. It sets forth, with marvellous perspicacity, the essential principles of rational liberty; and is the treasure-house whence the modern American constitutions have derived most of their valuable elements. X
1285. 13 Edward I. Statute *de donis conditionalibus* enacted, giving rise to *Estates tail*; whereby lands were designed, by the Nobles who enacted the law, to be settled upon families *inalienably*, as long as any of the blood in the direct line of descent subsisted (13 Ed. I, c. 1). X
1290. 18 Edward I. Statute of *Quia emptores terrarum*, whereby feudal tenants were allowed to aliene lands in fee-simple, without consent of the lord (18 Ed. I, c. 1). X
1295. 23 Edward I. Real epoch of the *House of Commons*, the early germ of which appears in 49 Hen. III (A. D. 1263).
1370. 43 Edward III. The doctrine of *Uses and Trusts* introduced by the Ecclesiastics, in order to evade the Statutes of *Mortmain*, which forbade Corporations, and especially religious Corporations (Monasteries, &c.), from acquiring lands without license from the Crown.
1473. 12 Edward IV. *Taltarum's Case*, which determined that *Estates-tail* were *barrable* (i. e., conveyable) by the device of a *Common Recovery* (which is merely a judgment collusively recovered by the intended grantee of the land); thus defeating, after an interval of nearly two hundred years, the skilfully devised, but mischievous policy, of the great *Statute of Entails*, 13 Edw. I, c. 1.
1536. 27 Henry VIII. *Statute of Uses*; whereby *Uses*, which before were only *equitable interests*, were intended to be converted into *legal estates*; the design being to *abolish uses, or equitable estates, altogether*, although, by the construction of the courts, it fell very far short of that effect (27 Hen. VIII, c. 10).
1541. 32 Henry VIII. *Statute of Wills*; which allowed *lands* to be transferred from one to another, by the *last will of the owner* (32 Hen. VIII, c. 1, supplemented by 34 Hen. VIII, c. 5). X
1628. 3 Charles I. *Petition of Right*; setting forth, as solemnly acknowledged by the Crown, the fundamental doctrines of English liberty (3 Car. I, c. 1).
1660. 12 Charles II. Statute abolishing *Tenure in Chivalry*, with its oppressive incidents, and all *oppressive* feudal tenures, retaining only *tenure in Socage*, and three others.
1678. 29 Charles II. Statute to prevent *Frands and Perjuries*; by requiring certain transactions to be *in writing*, and in

A. D.

some instances solemnly authenticated besides, embracing especially provisions touching—

1. Conveyances of land.
2. Contracts for the sale or lease of lands, and some other Contracts.
3. Wills, particularly of *lands* (29 Car. II, c. 3, § 1 to 5).

1680. 31 Charles II. *Habeas Corpus Act*; whereby provision was made for a prompt judicial inquiry into the legality of every imprisonment alleged to be without sufficient lawful warrant.
1688. 1 William and Mary. *Great Revolution*, accomplished by the agency of William, Prince of Orange; whereby James II was virtually expelled for mis-government, and his daughter Mary, the wife of the Prince of Orange, together with her husband, were invited *by the two houses of parliament*, to occupy the vacant throne, upon conditions consonant with the ancient liberties of England, as set forth anew in the declaration known as the *Bill of Rights* (1 Wm. & M. St. 2, c. 2): thus ascertaining the title to the crown of Great Britain to be undeniably a *parliamentary title*, and not a title *jure divino*.
1695. 7 William III. Statute allowing Counsel to persons *indicted for treason* (7 Wm. III, c. 3).
1700. 12 & 13 William III. *Act of Settlement*; settling the Crown of Great Britain, upon failure of the issue of the Princess Anne, Mary's sister, upon the Princess Sophia of Brunswick, and the heirs of her body, *being Protestants* (12 & 13 Wm. III, c. 2).
1701. 12 & 13 William III. Statute (part of the Act of Settlement) changing the tenure of office of the Judges of England, from *during the King's pleasure* to *during good behaviour*; the commission, however, being still liable to be vacated by the *demise of the Crown* (12 & 13 Wm. III, c. 2).
1714. 1 George I. Statute prolonging the *duration of the parliament* from three to *seven years*! (1 Geo. I, c. 38.)
1747. 20 George II. Statute allowing Counsel in *Parliamentary impeachments* for treason (20 Geo. II, c. 30).
1752. 24 George II. Statute introducing the "*change of style*," by correcting the Julian Calender, after the example of Pope Gregory XIII, in 1582 (24 Geo. II, c. 23).
1760. 1 George III. Statute making the tenure of office of Judges to continue *during good behavior*, notwithstanding the *demise of the Crown* (20 Geo. III, c. 23).
1800. 39 & 40 George III. *Legislative Union* of Great Britain and Ireland (39 & 40 Geo. III, c. 77).
1832. 2 William IV. Statute *reforming the representation* in Parliament (2 Wm. IV, c. 45).
1834. 4 William IV. Statute introducing important reforms of the practice of *Pleading* (3 & 4 Wm. IV, c. 42).

A. D.

1834. 4 William IV. Statute modifying the *common law canons of Descent* (3 & 4 Wm. IV, c. 106).
1837. 7 William IV. Statute allowing Counsel in all Criminal Proceedings (6 & 7 Wm. IV, c. 114).
1845. 8 Victoria. Statute declaring all lands, as to the immediate freehold thereof, to *lie in grant as well as in livery* (8 & 9 Vict. c. 106):

## SECTION ii.

## DATA TOUCHING THE CHRONOLOGY OF ENGLISH AND AMERICAN LAW.

A. O.

55. Romans landed in Britain, under Julius Cæsar.

A. D.

186. Christianity introduced into Britain, at the request of Lucius, King of the Britons, under the auspices of Pope Eleutherius (Bede, Ecc. Hist. B. I, c. 4; 1 Rapin Hist. Eng. 28 (B. I).
408. Romans finally abandoned Britain, *temp.* Emperor, Honorius.
449. Saxons invited over by Britons, in order to assist in repelling the Picts and Scots.
600. Saxon *Heptarchy* established.
827. Kingdoms of *Heptarchy* united under *Egbert*.
832. First Invasion of the Danes.
871. Alfred *the Great*.
890. Local customs of the *Heptarchy* collected and digested by Alfred into one general Code, called *Dome-book* (Dom-boc), or *Liber Judicialis*; extant in the reign of Edward IV (A. D. 1461), but now lost. (1 Bl. Com, 64-5; 1 Reeve's Hist. Eng. Law, 25-6.)
901. Edward the Elder.
925. Athelstan.
941. Edmund,
946. Edred.
955. Edwy.
- “ Edgar.
975. Edward the Martyr.
978. Ethelred.
1013. The Danes, under Sweyn, enter London, whence Ethelred, at their approach, fled to Normandy; and Sweyn is proclaimed King.
1013. Sweyn, *First Danish King*.
1014. Ethelred restored.
1016. Edmund Ironside.
1016. *Kingdom divided by Convention*, between Edmund and Canute, son of Sweyn.
1017. Canute succeeds to the whole, on Edmund's death. *Second Danish King*.

# HISTORICAL SKETCH.

- 1035. Harold Godwinson. *First Danish King.*
- 1039. Harthacnut. or Canute II. *Fourth Danish King.*
- 1041. Edward the Confessor. *Last Saxon King of the*  
*English race.*

1042. Re-implication of Alfred's laws, which had been greatly interrupted by local usages during the one hundred and fifty years which had elapsed since they were first collected. Hence, as Alfred is the *Lawgiver*, so Edward is styled *Restorer* *Legum Anglorum*.  
1 Bl. Com. 46. 1 Reeves Hist. Eng. Law. 35-4; 1 Rep. Hist. Eng. 147. & seq.; Dis-  
sert. Gov. of Eng. Sax.; 2 Term's Ang. Sax.  
Hist. 131. & seq.

Norman  
Dynasty.

1066. Harold. January 5. In violation of the law of suc-  
cession.

1066. William I. October 14. *First Norman King.* Suc-  
ceeded by the conquest of the Country.

1066. Feudal law maintained in its utmost rigor by  
consent of the *Commons* *Concilium*. Wit-  
nessed by the *Parliament*. 1 Reeves' Hist.  
Eng. Law. 34 to 36; Hale's Hist. Com. Law,  
133 to 135 & n. B; Sax. Chron. A. D. 1066;  
1 Hume's Eng. App. x II.

1086. *Domesday Book* completed. A census of  
lands, tenants, and tenants for the whole  
realm: a master-piece of state-craft. (1  
Reeves' Hist. Eng. Law. 219; Hale's Hist.  
Com. Law. 137. & seq. n's (a) and (M);  
Roger of Hov. Chron. A. D. 1086; Hall  
Mid Ages. c. VIII.)

1087. William Rufus. September 26.

1100. Henry I. August 5.  
During this reign, by a statute or assise,  
not extant, the first limitation was imposed  
on any action *for lands*—namely, that no  
writ of Right should be brought on any title  
accruing *before* 1 Hen. I. (2 Inst. Com. &  
Stat. Law. c. xvii.)

Plantagenet  
Dynasty.

1135. Stephen. December 26.

1138. Roman Imperial (or Civil) Law introduced into  
England by the Ecclesiastics. (1 Bl. Com.  
18; 1 Inst. Com. & Stat. Law 12, 13; 1  
Reeves' Hist. Eng. Law, 68.)

Plantagenet  
Dynasty.

1154. Henry II. December 19.

1164. 10 Henry II. Constitutions of Clarendon, de-  
fining and limiting the immunities of the  
clergy, and the ecclesiastical jurisdiction.  
(Hale's Hist. Com. Law. 164, & n (B); Mat.  
Par. Chron. A. D. 1164.)

1187. 33 Henry II. Glanvil, "Treatise on the Laws  
and Customs of England."

1189. Richard I, *Cœur de Lion*. September 23.

A. D.

1194. "Laws of Oleron," compiled under Richard's direction, at the isle of Oleron, off the coast of France, near the mouth of the Garonne, upon his return from Palestine. (1 Reeves' Hist. Eng. Law, 212; Hale's Hist. Com. Law, 105, & n (D).) Plantagenet Dynasty.
1199. John. May 27.
1215. 17 John. *Magna Charta* assented to by John, at Runnymede, on the Thames, a few miles west of London. (1 Rap. Eng. 285, B. VIII; 1 Reeves' Hist. Eng. Law, 209, 231; Hal. Mid. Ages, c. VIII.)
1216. Henry III. October 28.
1225. 9 Henry III, c. 1 & seq. *Magna Charta* confirmed. First English Statute extant. The Great Charter was confirmed, with occasional variations, comparatively immaterial, above thirty times. (1 Th. Co. Lit. 22; 2 Reeves' Hist. Eng. Law, 84-5.)
1225. 9 Henry III, c. 36. *First Statute of Mortmain*. (2 Bl. Com. 270; 1 Reeves' Hist. Eng. Law, 209, 231; 2 Insts. Com. & Stat. Law, c. xviii.)
1263. Bracton. "Treatise of the Laws and Customs of England." (Hale's Hist. Com. Law, 289-'90; 2 Reeves' Hist. Eng. Law, 86 & seq. 4 Id. 570-'71, & n. t.)
1265. House of Commons originated, or at least its *germ recognized*. (Bac. Abr. Court of Parliament, (A); 1 Hume's Eng. 432.)
1268. 52 Hen. III. Statute of Marlebridge, punishing *Waste* in all tenants for life or years. (2 Insts. Com. & Stat. Law, c. xviii.)
1272. Edward I. November 20.
1272. Beginning of the Year-books, or annually published Reports of the Cases adjudged by the principal Courts of England, taken and published by public authority. They were continued from 1 Edw. I, to the end of the reign of Edw. III (A. D. 1377); intermitted for twenty-two years, through the reign of Ric. II; resumed again about 1 Hen. IV (A. D. 1399); and kept up, but not with absolute regularity, until 27 Hen. VIII (A. D. 1536). (2 Reeves' Hist. Eng. Law, 357.)
1278. 6 Ed. I, c. 5. Statute of Gloucester, punishing *Waste* with treble damages, and forfeiture of the *thing* (place) wasted. (2 Insts. Com. & Stat. Law, c. xviii.)
- " 6 Edw. I, c. 3. Statute of Gloucester, limiting the effect of collateral warranty by tenant by the Curtesy, in barring the claim of the wife's heir, to the heritage descended *from the father*. (2 Inst. Com. & Stat. Law. c. xx.)

Plantagenet  
Dynasty.

A. D.

1279. 7. Edw. I, Statute 2. *Second Statute of Mortmain.*
1280. Introduction by Ecclesiastics, of *Common Recoveries*, to evade the Statutes of *Mortmain*, by a seeming but collusive recovery of the lands *by suit*. (2 Bl. Com. 271; 2 Insts. Com. & Stat. Law, c. xviii.)
1285. Fleta. "Commentaries upon the English Law." Supplemental to Bracton. (2 Reeves' Hist. Eng. Law, 279.)
- " 13 Edw. I, c. 1. Statute Westm. II, "*de Donis Conditionalibus*," creating Estates Tail. (2 Reeves' Hist. Eng. Law, 164; 2 Insts. Com. & Stat. Law, c. vii.)
- " 13 Edw. I, c. 18. Statute Westm. II, of *Elegit*, giving creditors an execution (afterwards called *Elegit*), against a moiety of debtor's *freehold lands*. (2 Insts. Com. & Stat. Law, c. x.)
- " 13 Edw. I, c. 18. Statute Westm. II, "*de Mercatoribus*," permitting a security for money, called a recognizance of *Statute Staple*, to be charged on *all the lands* of the debtor. (2 Bl. Com. 160; 2 Insts. Com. & Stat. Law, c. x.)
1289. Britton. A *Compendium* of Bracton, presenting a more distinct view (in Norman French) of the doctrines of the law. (2 Reeves' Hist. Eng. Law, 280.)
1290. 18 Edw. I, c. 1. Statute Westm. III, *Quia emptores terrarum*, permitting the feudal tenants of *subjects* (not of the Crown) to aliene their lands in *fee simple*, without consent of the lord; the lands, however, *to be held not of the grantor*, but of the *chief lord of the fee*. (2 Reeves' Hist. Eng. Law, 223; 2 Insts. Com. & Stat. Law, c. xix.)
1295. 23 Edw. I. Real Epoch of House of Commons. (1 Hume's Eng. 470.)
1307. Edward II. July 8.
1322. 15 Edw. II. Statute recognizing the House of Commons. (1 Hal. Const'l History, 3.)
1326. Edward III. January 25.
1326. 1 Edw. III, c. 12. Statute permitting tenants *in capite* (*i. e.*, of the King) to aliene their lands, subject to a reasonable *fine* to the King for his consent. (3 Th. Co. Lit. 211-'12, n (A).)
1330. 4 Edw. III, c. 14 Statute providing for *annual parliaments*. (2 Hal. Const. H. 72.)
1351. 23 Edw. III, c. 2. Statute *defining treason*, and abolishing the doctrine of *constructive treasons*. (4 Bl. Com. 67; Synops. Crim. Law, 26-'7.)



A. D.

1363. 36 Edw. III, c. 15. Statute enacting that law-proceedings should be *conducted in the English tongue*, but be *entered and enrolled in Latin*. Previously the proceedings had been both conducted and enrolled in Norman French; in which language the law treatises and reports continued to be written for more than three hundred years afterwards. (3 Bl. Com. 318, & seq.) Plantagenet  
Dynasty.
1370. 43 Edw. III. The doctrine of *Uses and Trusts* introduced into the English law by the Ecclesiastics, in order to evade the statutes of *Mortmain*, and soon universally employed by the people, in order to obviate feudal oppressions and inconveniences. (2 Bl. Com. 328; 2 Inst. Com. & Stat. Law, c. x, xviii.)
1377. 50 Edw. III, c. 6. Statute recognizing *the existence of Uses*. (2 Bl. Com. 328; 2 Inst. Com. & Stat. Law, c. x.)
1377. Richard II. June 22
1392. 15 Ric. II, c. 5. *Fourth Statute of Mortmain*, subjecting Uses and Trusts to the *Mortmain* policy. (2 Bl. Com. 329; 2 Inst. Com. & Stat. Law, c. x, xviii.)
1399. Henry IV. September 30. Lancaster-  
Plantagenet  
Dynasty.
1413. Henry V. March 21.
1422. Henry VI. September 1.
1461. Edward IV. March 4. York-Plan-  
tagenet  
Dynasty.
1461. 1 Edw. IV Statute confirming all judicial acts and private business transactions occurring in the "Time or Times of Henry IV, Henry V, his son, and Henry VI, his son, late in *Deed*, and not in *Right*, successively Kings of England." (2 Eng. Stats. at Large, 586.)
1473. 12 Edw. IV. *Taltarum's Case*, which determined Estates-tail to be *barrable* (that is, conveyable) by *Common Recovery*. (2 Bl. Com. 117; 2 Inst. Com. & Stat. Law, c. vii.)
1475. 14 Edw. IV. Littleton's *Tenures composed*, but not *printed* until about 1481. (Lit. Ten. Pref. ix; 1 Hargr. Co. Lit. Pref. v, xxii; 4 Reeves' Hist. Eng. Law, 113, & seq.)
1483. Edward V. April 9.
- " Richard III. June 26.
1483. 1 Ric. III, c. 5. Statute vesting lands, where the King, when Duke of Gloucester, had been feoffee to Uses, in the *Cestui que Use*. (1 Bl. Com. 332; 2 Inst. Com. & Stat. Law, c. x.)
1485. Henry VII. August 22. Lancaster-  
Plantagenet  
and Tudor  
Dynasty.
1496. 11 Hen. VII, c. 20. Statute limiting the effect of Collateral Warranty by *tenant in Dower*, in barring the husband's heir, to the *heritage*



## A. D.

Lancaster-  
Plantagenet  
and Tudor  
Dynasty.

- descended* from the dowress. (2 Bl. Com. 303; 2 Inst. Com. & Stat. Law, c. xx.)
1504. 19 Hen. VII, c. 15. Subjecting *Uses* to *execution for debts*, like legal estates. (2 Bl. Com. 332; 4 Reeves' Hist. Eng. Law, 139.)
1509. Henry VIII. April 22.
1532. 23 Hen. VIII. Reformation begun in England. (4 Reeves' Hist. Eng. Law, 205, 437, 443; 1 Rap. Eng. 794, B. xv; Burnet's Hist. Reform'n; 5 D'Aubigné's Hist. Reform'n.)
1537. 27 Hen. VIII, c. 10. *Statute of Uses*, converting *Uses* into *legal estates*, and designed to *abolish Uses* altogether, although in that it failed of effect. (2 Bl. Com. 333; 2 Inst. Com. & Stat. Law, c. x, xx.)
- 1541, 32 Hen. VIII, c. 1. *Statute of Wills*, allowing lands to be disposed of *by will*, provided it were *in writing*. Supplemented by Stat. 34 Hen. VIII, c. 5. (2 Bl. Com. 375.)
- " 32 Hen. VIII, c. 24. Statute dissolving monasteries.
1547. Edward VI. January 28.
1552. 5 & 6 Edw. VI, c. 16. Statute touching the sale of offices. (2 Bl. Com. 36-'7, & n (31); 2 Inst. Com. & Stat. Law, c. xxi; Bac. Abr. Offices (F).)
1553. Mary. July 6.
1557. 4 & 5 Ph. & Mar. c. 8. Statute touching the custody, and by construction the guardianship, of female infants under sixteen, *in respect of marriage*. (1 Bl. Com. 461; 1 Inst. Com. & Stat. Law, 429-'30.)
1558. Elizabeth. November 17.
1571. 13 Eliz. c. 5. Statute making *voidable* fraudulent conveyances of *lands and chattels*, in respect to *creditors*. (2 Bl. Com. 296; 2 Insts. Com. & Stat. Law, c. xx.)
1585. 27 Eliz. c. 4. Statute making voidable fraudulent conveyances of *lands*, in respect to *purchasers*. (2 Bl. Com. 296; 2 Insts. Com. & Stat. Law, c. xx.)
1601. 43 Eliz. c. 4. Statute declaratory chiefly of the common law, touching and giving effect to *vague and indefinite charities*. (2 Bl. Com. 376; 2 Insts. Com. & Stat. Law, c. x, xix; Vidal vs. Girard's Ex'ors, 2 How. 194 & seq.)
1603. James I. March 24.
1606. 4 Jac. I. First Charter of Virginia to Sir Thomas Gates and others, April 10, 1606. (1 Hen. Stats. at Large, 57 & seq.)
1611. 8 Jac. I. First institution of *private property* in Virginia. (2 Insts. Com. & Stat. Law, c. i.)

Stuart  
Dynasty.

A. D.

1619. 16 Jac. I. First Assembly held in Virginia, it was long believed without regular authority (1 Hen. Stats. 121, n \*; Stith's Virginia, 160); but explorations in the British State Paper office now show the contrary. (Colon'l Records of Virginia, Introd. Note, vii.) Stuart  
Dynasty.
1620. 17 Jac. I. Slaves first introduced into Virginia by a Dutch man-of-war. (Bev. Hist. Va. 51; 1 Burk's Va. 211; 1 Insts. Com. & Stat. Law, 163 & seq.)
1623. 20 Jac. I. First Assembly held in Virginia whose proceedings were retained in the colonial archives. (1 Hen. Stats 121.)
1624. 21 Jac. I, c. 16. First *general* Statute of Limitations in England. (3 Bl. Com. 188 & seq.; Id. 306 & seq.; 2 Insts. Com. & Stat. Law, c. xvii.)
- “ 21 Jac. I. Charter of Virginia cancelled upon writ of *quo warranto* in King's Bench, thus converting the *charter* into a *Provincial* or *Royal* government, because it was supposed to be a nursery of *democracy*. (1 Burk's Va. 294; Campb. Va. 173-'4; 1 Insts. Com. & Stat. Law, 47.)
1625. Charles I. March 27.
1628. 3 Car. I, c. 1. The famous statute known as “*The Petition of Right*,” setting forth very emphatically some of the most important rights of the people of England, to which the king yielded a reluctant consent. It may be considered as the first setting the battle in array between liberty and prerogative. (1 Bl. Com. 128; 1 Inst. Com. & Stat. Law, 60; 1 Hal. Const. Hist. Eng. 286, 288.)
1628. 3 Car. I. Sir Edward Coke's Commentary on Littleton's Tenures (1 Institute), *printed*. (1 Hargr. Co. Lit. Pref. xxiii (to 13th edition).)
1640. 16 Car. I, c. 1. Statute providing for and *securing triennial parliaments*. (2 Hal. Const. Hist. Eng. 72-'3.)
1649. 23 Car. I. Charles I *beheaded*, January 30.
1649. Commonwealth. January 30. Common-  
wealth.
1649. 1 Commonwealth. Act of the General Assembly of Virginia, declaring the indignation of the colony at the decapitation of Charles I; and avowing loyalty to his son, Charles II. (1 Hen. Stats. 359.)
1651. Capitulation and surrender of the colony of Virginia to the commissioners of the Commonwealth of England. (1 Hen. Stats. 363, 365; 2 Burk's Va. 85 & seq.; Camp. Va. 217 & seq.)

- A. D.
- Cromwell  
Dynasty. 1654. Cromwell, (Oliver). January 9.  
1658. Cromwell, (Richard). September 13.
- Stuart  
Dynasty. 1660. Charles II. May 29.  
~~He~~ Considered as succeeding his father, January 30, 1649, and the regnal years reckoned accordingly.
1660. 12 Car. II, c. 24. Stat. abolishing Tenure in Chivalry, with its oppressive incidents, and all *oppressive* feudal tenures, retaining only tenure *in Socage*, and three others. (2 Bl. Com. 77.)
1664. 16 Car. II, c. 1. Statute repealing act for *triennial* parliaments. (2 Hal. Const. Hist. Eng. 244-5.)
1678. 29 Car. II, c. 3. Statute to prevent *Frauds and Perjuries*, by requiring certain transactions to be *in writing*, and in some instances solemnly authenticated besides; embracing especially provisions touching—
1. *Conveyances* of land;
  2. *Contracts* for the sale or lease of lands, and some other contracts. (2 Insts. Com. & Stat. Law, c. xix.)
  3. Wills, especially of lands.
1680. 31 Car. II, c. 2. Statutes securing to the subject the benefit of the writ of *Habeas Corpus*, the statute being known as the "*Habeas Corpus Act*." (2 Bl. Com. 135 & seq.; Bac. Abr. Habeas Corpus, (B).)
1685. James II. February 6.
- Orange and Stuart  
Dynasty. 1689. William and Mary. February 13.  
1689. 1 Wm. & Mar. *Great Revolution*, accomplished by the agency of William, Prince of Orange; whereby James II was virtually expelled, for mis-government, and his daughter Mary, the wife of the Prince of Orange, together with her husband, were invited *by the two houses of Parliament*, to occupy the vacant throne, upon *express* conditions, consonant with the ancient liberties of England, as set forth anew in the declaration known as the *Bill of Rights*. (1 Wm. & M. St. 2, c. 2; 3 Hal. Const. Hist. Eng. 62 & seq.)
1692. 3 & 4 Wm. & M. c. 14. Statute of *Fraudulent devises*, making devisees of lands liable for decedent's debts, nearly as heirs are. (2 Bl. Com. 378.)
1694. 6 Wm. & M. c. 2. Statute establishing *triennial* parliaments. (1 Bl. Com. 189.)
- Orange  
Dynasty. 1704. William III. December 28.  
~~He~~ The regnal years are reckoned from the accession of William and Mary, in 1689.
1695. 7 Wm. III, c. 3. Statute allowing counsel to

A. D.

persons *indicted* for treason. (4 Bl. Com. 356; Synops. Crim. Law, 245.) Orange  
Dynasty.

1696. 8 & 9 Wm. III, c. 11. Statute allowing several breaches of the condition to be assigned in actions on bonds with *collateral condition*, and judgment for the penalty, as at common law, but to be discharged by the damages assessed by a jury for the breaches. (Bac. Abr. Oblig'n, (F).)

1700. 12 & 13 Wm. III, c. 2. Statute known as the "*Act of Settlement*," settling the Crown of Great Britain, upon the failure of the issue of the Princess Anne, Mary's sister, (Mary herself being now dead without issue), upon the Princess Sophia, of Brunswick, and the heirs of her body, *being Protestants*, with some new provisions for better securing the religion, laws, and liberties, which the Statute declares to be "the birthright of the people of England" (1 Bl. Com. 128; 3 Hal. Const. Hist. Eng. 134 & seq.)

" 12 & 13 Wm, III, c. 2. Statute (a portion of the Act of Settlement) changing the tenure of office of judges from *during the King's pleasure*, to *during good behavior*; but still leaving their commissions liable to be vacated by the *demise of the crown*. (1 Bl. Com. 267-'8; 3 Hal. Const. Eng. Law, 135, 142-'3.)

1702. Anne. March 8.

1705. 3 & 4 Anne, c. 9. Statute making promissory notes, payable *unconditionally*, to *order*, or to *bearer*, and for a *sum certain*, assignable *like bills of exchange*. (2 Bl. Com. 467.)

1705. 3 & 4 Anne. Statute in Virginia, making estates-tail inalienable, *except by act of Assembly*. (3 Hen. Stat. 320.)

1706. 4 & 5 Anne, c. 16, § 21. Statute declaring all *collateral warranties* by any ancestor, who has no estate of inheritance in possession, to be *void against his heir*. (2 Insts. Com. & Stat. Law, c. xx; 2 Bl. Com. 303.)

1706. 4 & 5 Anne, c. 16, § 12, 13. Statute directing judgment *on money-bonds in a penalty*, to be entered for the penalty, but to be discharged by payment of the principal sum, with interest (3 Bl. Com. 435.)

1706. 4 & 5 Anne, c. 16, § 4, 5. Statute allowing defendant to an action to plead as many pleas *as may be necessary*. (3 Bl. Com. 308.)

1707. 5 Anne, c. 8. Statute consummating the Union with Scotland. (1 Bl. Com. 95.)

1714. George I. August 1.

1714. 1 Geo. I, c. 38. Statute making the existing

Stuart  
Dynasty.

Brunswick  
Dynasty.

A. D.  
Brunswick  
Dynasty.

- Parliament (elected under the *triennial* Act) to last for *seven years!* Providing also in general for *Septennial* Parliaments. (1 Bl. Com. 189; 3 Hal. Const. Hist. Eng. 171 & seq.)
1727. George II. June 11.
1734. 7 Geo. II. Statute in Virginia making estates-tail alienable *by deed simply*, without an act of Assembly, provided they were ascertained by *judicial inquiry*, to be of less value than £200 sterling, &c. (4 Hen. Stats. 400.)
1747. 20 Geo. II, c. 30. Statute allowing counsel in *Parliamentary impeachments* for treason. (4 Bl. Com. 356; Synops. Crim. Law, 245.)
1752. 24 Geo. II, c. 23. Statute changing "the style," and correcting the *Julian* Calendar, after the manner of Pope Gregory XIII, in 1582. (2 Insts. Com. & Stat. Law, c. ix.)
1760. George III. October 25.
1760. 1 Geo. III, c. 23. Statute making tenure of office of Judges to be *during good behavior*, and to continue notwithstanding *the demise of the Crown*. (1 Bl. Com. 268.)
1765. 5 Geo. III, c. . Statute imposing stamp-duties on American Colonies.
1766. 6 Geo. III, c. 12. Statute repealing the stamp-duties, but *reserving the power to tax*. (1 Bl. Com. 109.)
1767. 7 Geo. III, c. Statute attempting the *internal taxation* of the colonies, by duties on *glass, paper, tea, &c.*
1770. 10 Geo. III, c. Statute abolishing the duties on the American colonies, *except on tea*
1773. 13 Geo. III. Destruction of cargoes of tea belonging to the East India Company, in the harbor of Boston.
1774. 14 Geo. III. Assembling of the first Continental Congress at Philadelphia, September 5.
1776. 16 Geo. III. June 29. Declaration of Independence *by Virginia*.
- " 16 Geo. III. *July 4.* Declaration of the independence *of the Colonies by Congress*.
- " October 7. Estates-tail in Virginia, converted by act of Assembly into estates in fee-simple. (9 Hen. Stats. 226; V. C. 1873, c. 112, § 9; 2 Insts. Com. & Stat. Law, c. vii.)
- " October. Commission, consisting of Thomas Jefferson and others, to revise the laws of Virginia. (2 Insts. Com. & Stat. Law, c. xiv.)
1778. Slave trade abolished by Virginia, near *thirty years* before *any other Government in the world*. (9 Hen. Stats. 471.)

A. D.

1779. June 18. Committee on revision of laws reported, but report not fully acted on until 1785. (2 Insts. Com. & Stat. Law, c. xiv.) Brunswick Dynasty.
1781. March 1. Articles of Confederation ratified by Maryland, the last of the States to assent to them.
- “ May. Pelatiah Webster's pamphlet urging insufficiency of existing articles of Confederation.
- “ October 19. Capitulation of Cornwallis at Yorktown, in Virginia, virtually ending the war.
1783. September 3. Independence of United States acknowledged by Great Britain, and treaty of peace and of boundary negotiated at Paris.
1784. A conviction becoming general that a revision of the Articles of Confederation was indispensable, and the formation of a *Government*, instead of a *Confederation*.
1786. January 21. A convention recommended by Virginia to take into consideration the trade of the United States, and the commercial regulations necessary for the common interest. (5 Ell. Debs. 113 & seq.)
- “ September 11. Assembly of convention of delegates from Virginia, Delaware, Pennsylvania, New Jersey, and New York, at Annapolis, Md. It confined itself to recommending a convention of delegates from all the States, to meet at Philadelphia, in May, 1787, “to devise such further provisions as shall appear to them to be necessary to render the constitution of the Federal Government *adequate to the exigencies of the Union*.” (5 Ell. Deb. 115-16.)
1787. November 23. Virginia complies with the recommendation, and appoints delegates, the other States following the example, except Rhode Island, which never sent any.
- “ January 1. Statute in Virginia takes effect (enacted October, 1785), *abolishing* the common law of Descents, and substituting a wholly new system. (12 Hen. Stats. 138; 2 Insts. Com. & Stat. Law, c. xiv.)
- “ January 1. Statute in Virginia takes effect, dispensing with “*heirs*,” or any other specific word of inheritance, in order to create an estate of inheritance. (2 Insts. Com. & Stat. Law, c. vii; V. C. 1873, c. 112, § 8.)
- “ May 14. Day appointed for the assembling of the convention to “devise such further provisions as shall appear to be necessary to render the Constitution of the Federal Government *adequate to the exigencies of the*

A. D.

Continued  
History.

1787. May 25. Convention was organized by electing General Washington president. Delegates being present from Massachusetts, New York, New Jersey, Delaware, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia. Delegates appeared from Connecticut and Maryland May 26, and from New Hampshire July 23.

September 17. Convention completed the work of the Federal Convention and reported the same to the Congress of the Confederation.

September 28. Congress of the Confederation ordered the Constitution to be transmitted to the several Legislatures in order to be submitted to a convention of delegates chosen in each State by the people thereof. It recommended to the Legislatures of the Convention. (U. S. C. 278.)

1788. September 17. Eleven out of the twelve States which took part in the formation of the Constitution having ratified it by their conventions North Carolina assenting, the Congress of the Confederation adjourned first on Tuesday in February 1789 for the choice of electors of president the first Wednesday of February 1789 for the assembling of the electors to vote for a president; and the first Thursday in March 1789 at the then seat of Congress New York, at the time and place for assembling the electors under the Constitution. (U. S. C. 278.)

1789. March 4. Day appointed for the organization of the new government: but so doubtful was the expectation deemed that no quorum of the two Houses convened until April 6.

April 6. A quorum of the two Houses of Congress was at length assembled when the votes for president being counted it was found that General George Washington was unanimously elected president.

April 30. General Washington was sworn into office and the government of the United States then went into full operation in all its departments.

September 24. Judiciary act passed establishing the judicial department of the United States government substantially as at present.

November 21. North Carolina ratified the Constitution of the United States.



A. D.

1790. May 29. Rhode Island ratified the Constitution of the United States. Brunswick  
Dynasty.

“ December. Seat of Federal government removed from New York to Philadelphia. (1 Stor. Laws U. S. 10.)

1792. Slaves in Virginia made *personalty*, having been declared to be *real estate* in 1705. (1 Stats. at Large (N. S.), 128.)

1800. November 17. The seat of the Federal government permanently established on the Potomac, at Washington city. (1 Stor. Laws U. S. 796.)

“ 39 & 40 Geo. III, c. 77. Statute establishing a *legislative union* between Great Britain and Ireland. (1 Bl. Com. 104, & n (15).)

1807. March 7. United States statute abolishing African slave-trade by subjects of the United States. (2 Stor. Laws of U. S. 1050.)

“ 47 Geo. III, c. 36. Statute abolishing African slave trade by British subjects. (1 Steph. Com. 103.)

1817. 57 Geo. III, c. 6. Statute defining treason with increased strictness. (3 Hal. Const. Hist. Eng. 114, & seq.)

1819. 59 Geo. III, c. 46. Statute abolishing in England, trial by *Wager of battel*. (3 Steph. Com. 582, n (u) )

1820. January 1. Statute abolishing in Virginia the doctrine of *Carter v. Tyler* (1 Call. 143), touching the effect of limitations, coming after estates-tail converted into estates in fee-simple. (V. C. 1873, c. 112, § 9.)

“ January 1. Statute abolishing in Virginia the effect, at common law, of limitations to take effect on *failure of issue or of heirs, heirs of the body, &c.*, tying them up to refer to issue, &c., *living at the person's death, &c.* (V. C. 1873, c. 112, § 10.)

“ January 1. Statute in Virginia empowering Courts of Chancery to direct the sale of lands belonging to infants and non-sane persons. (V. C. 1873, c. 124, § 2.)

1820. George IV. January 29.

1829. 9 Geo. IV, c. 14. Lord Tenterden's Act, declaring that no promise *by words only* shall prevent the bar of the Statute of Limitations, unless it be in writing, signed by the party to be charged, &c. (3 Steph. Com. 555; Chit. Cont. 818.)

1830. William IV. June 26.

1832. 2 Wm. IV, c. 45. Statute reforming the representation in the English Parliament. (2 Steph. Com. 379.)



Brunswick  
Dynasty.

A. D.

1834. 3 & 4 Wm. IV, c. 27 and c. 74. Statute abolishing all warranties (that is, the ancient covenant real, so called), together with all real actions. (2 Inst. Com. & Stat. Law, c. xx; Rawle's Cov'nts of Title, 24.)
- " 3 & 4 Wm. IV, c. 42. Statute abolishing in England trial by *Wager of Law*. (3 Steph. Com. 525.)
- " 3 & 4 Wm. IV, c. 42, § 11, 12. Statute (together with *Rules of Court* of Hilary term, 1834) modifying the rules of pleading, (1), By substituting *special pleas* for the *general issues*; and (2), By doing away with needless forms. (Steph. Pl. 158, and 1st App'x, lvi.)
- " 3 & 4 Wm. IV, c. 106. Statute modifying the Common Law (*Canons of Descent*. (2 Inst. Com & Stat. Law, c. xiv.)
1837. 6 & 7 Wm. IV, c. 114. Statute allowing Counsel in all criminal proceedings. (4 Steph. Com. 426; Synops. Crim. Law, 245.)
1837. Victoria. June 20.
1837. 7 Wm. IV, & 1 Vict. c. 26. Statute modifying the ceremonies to attend the execution of Wills. (Wms. Real Prop. 187, & seq.)
1845. 8 & 9 Vict. c. 106. Statute of *Grants*, declaring lands, as to the *immediate free-hold* thereof, to *lie in grant*, as well as *in livery*.
1850. Statute of *Grants*, in Virginia, declaring lands, as to the immediate free-hold thereof, to *lie in grant*, as well as *in livery*. (V. C. 1873, c. 112, § 4.)
- " Statute in Virginia, essaying to abolish the *Rule in Shelley's Case*, wherever the ancestor takes an estate *for his life*. (V. C. 1873, c. 112, § 11.)
- " Statute in Virginia modifying the ceremonies which are to accompany the making, &c., of Wills, after the model of 7. Wm. IV, and 1 Vict. c. 26. (V. C. 1873, c. 118, § 1, & seq.)
- " Statute in Virginia modifying the rules of pleading, somewhat after the model of 3 & 4 Wm. IV, c. 42, and Rules of Court of Hilary term 1834, but omitting, unhappily, to substitute special pleas for the *general issues*. (V. C. 1873, c. 167, § 18, 21, 23, 25 to 31; Id. c. 172, § 49.)

# INSTITUTES

OF

## COMMON AND STATUTE LAW.

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### INTRODUCTION.

Before entering upon an exposition of the doctrines and principles which are included within the wide domain of the "Common and Statute Law," it will be expedient to follow the example of the great Commentator upon the laws of England, and to present, according to his general plan, an Introduction, which shall set forth sundry preliminary topics indispensable to the full comprehension of that which is to follow. Nor must the student be impatient if he finds much transferred from Blackstone's pages, which *directly* is applicable to England alone. In due time it will be found that little or nothing is thus inserted which is not needful to elucidate the institutions of our own country, and necessary to a clear and intelligent apprehension of those rules of conduct governing our people, which are for some time to engage our inquiries. Deriving the bulk, nay almost the *entirety*, of our jurisprudence from England, we are hardly less interested than Blackstone's auditors in remarking its importance as a subject of thought and inquiry; in tracing out its originals in the mother country; in examining the causes which have affected its progress there; and in determining those local divisions within which it operates.

This Introduction, therefore, will be occupied, as Blackstone's is, with observations tending to illustrate, (1), The study of the law; (2), The nature of laws in general; (3), The kinds and general character of the laws of England, and incidentally, of our own country; and (4), The countries subject to the authority and to the laws of England; with a glance also to the countries subject to our own laws;

Wherein consider,

## SECTION I.

## ON THE STUDY OF THE LAW.

## I. THE STUDY OF THE LAW.

In order to bring together, in brief, what is most interesting and profitable in connection with the study of the law, we must note, (1), The utility of the study; (2), The causes of the neglect and disuse of it in the Universities of Oxford and Cambridge; (3), The reasons for resuming it there; and (4), the methods whereby the study may be facilitated;

Wherein consider,

1<sup>a</sup>. The Utility of the Study of the Law.

In discussing the utility of the study of the law to the various educated classes of society, it is of course not designed to include professional lawyers; although, when it is considered how limited, inaccurate and undigested is the knowledge with which too many enter upon the practice and painful responsibilities of the profession, words of warning and expostulation would not be misapplied. But it is proposed to exhibit the advantages of some acquaintance with the leading principles of jurisprudence with reference (1), To persons of fortune; (2), To persons engaged in mercantile and mechanical pursuits; and (3), To members of the other learned professions;

Wherein consider,

1<sup>b</sup>. Utility of the Study of the Law to *Persons of Fortune*.

The advantage to persons of independent estates of a knowledge of the leading doctrines of the law, may be set forth, (1), In respect to their private concerns; and (2), In respect to business of a public nature;

Wherein consider,

1<sup>c</sup>. In respect to their Private Concerns; Wherein consider.1<sup>d</sup>. As regards their own Estates.

It is by no means safe for a man to depend, in intricate concerns of business, upon his own knowledge of legal principles and processes. But some acquaintance with the elements of the law will enable him at least to understand where some of the quicksands are which occasionally swallow up fortunes, and admonish him to provide himself with competent guidance, when one wholly uninstructed may become a victim before he is aware of his danger. Sir Edward Sugden's "Letters to a man of Property," in England, and in this country the numerous attempts by eminent writers at popular expositions of "Laws of Business," and "Hand-Books of Law for Business Men," sufficiently attest the general conviction, both within the profession and without, that a certain familiarity with the rudiments is eminently desirable to the two classes of men of property, and men of business. (1 Bl. Com. 7.)

2<sup>d</sup>. As respects *the Making of Wills*.

As the business of will-making is in too many instances transacted without professional advice, with no other assistance than may chance to be at hand, an intelligent acquaintance with the ceremonies required by law, in order to guard against fraud, and also with the force and effect of the limitations which men usually desire to have inserted in their wills, will often prove invaluable to others, his neighbors and friends, as well as to the possessor himself. The confusion and distress not seldom occasioned in families by the want of this knowledge; the uncertainty of the testator's meaning, and the difficulty and expense of ascertaining it after his death; the utter perversion of his real purpose, from the necessity of being governed by his unguarded and erroneous use of terms, combine to illustrate, very unhappily, how useful even a little systematic instruction upon such subjects may be. (1 Bl. Com. 7, 8.)

2<sup>c</sup>. In respect to business of *a Public Nature*.

All men of property are liable to be called upon to act in various public capacities of more or less importance, the duties of all of which would be discharged with far more efficiency to the public, and credit to themselves, if they who exercise them were imbued with some legal knowledge. Of these functions it may suffice to mention those of jurors, justices of the peace, and legislators;

Wherein consider,

1<sup>d</sup>. As Jurors.

The common law idea of a juror's office made it eminently important and dignified. He is called on to establish the rights, to estimate the injuries, to weigh the gravest accusations, and sometimes to dispose of the lives of his fellow-citizens. In this situation he has frequently to decide nice questions of great importance, in the solution of which some acquaintance with legal doctrines, either acquired before-hand, or picked up at hap-hazard in the progress of the cause, is indispensable; especially where the law and the fact are, as often happens, intimately blended together. And the general incapacity of even our best juries to do this with any tolerable propriety in intricate cases, in conjunction with the neglect of special pleading amongst us, and the disuse of the common law practice of the judge summing up the evidence in the cause, and charging the jury as to the law, has tended grievously to debase their authority, and to lead some so far to forget the experience of the past as to anticipate with satisfaction the abolition of trial by jury altogether. (1 Bl. Com. 8.)

**2<sup>d</sup>. As Justices of the Peace.**

Formerly the ranks of justices of the peace in "all our counties were replenished almost exclusively from the men of property therein; and although modern innovation has done much to introduce into the commission of the peace a class of men who have no tangible evidence to give of "an interest in and attachment to the community," where they distribute justice, yet wherever men of property are willing to accept the office, if they are otherwise suitable, the people are usually well pleased to confer it upon them. And how ample a field of usefulness is here opened for a man to exert his abilities, by maintaining good order in his neighborhood; by punishing the criminal, the dissolute and idle; by protecting the peaceable and industrious; and above all, by healing petty differences, and preventing vexatious prosecutions. But in order to attain these desirable ends, the magistrate should understand his business, and have not the will only, but the ability also, (under which must be included the knowledge), to administer legal and effectual justice. Else when, through passion, through ignorance or folly, he has mistaken his authority, he becomes the object of contempt from his inferiors, and of censure from those to whom he is accountable. (1 Bl. Com. 8, 9.)

**3<sup>d</sup>. As Legislators.**

The duties of a legislator do not so much demand an accurate technical acquaintance with the details of the law, as that the person who proposes to engage with them should be imbued with a knowledge of the general principles of jurisprudence, and with those great doctrines of social and political right and wrong which ought in the main to guide his course. A mere lawyer may indeed be ignorant of, or inattentive to those general principles and doctrines, as one not a professional jurist may be profoundly tinctured with them; but in the main, the best practical pathway to a really useful familiarity therewith is through the elementary studies which fit one for the bar. Very many of the problems with which a legislator must deal, immediately and vitally concern the rights of the citizen in respect to his person or his property, and cannot be satisfactorily solved without adverting to the existing rules which regulate those rights; so that, if the lawgiver has no familiar knowledge of such rules, he must either depend upon such extrinsic information touching them as he can procure, or must hazard both his own reputation and the welfare of the community by following his caprices or prejudices, or yielding himself helplessly to the persuasions of others. As, therefore, most men of any culture

in this country expect at some time in the course of their lives to represent a smaller or larger constituency in the legislative councils of the State or Federal government, it would assuredly be well, ere they enter upon the role of the lawgiver, to pay some attention to the rudiments of the law. It may well be a subject of amazement, as Blackstone observes, that whilst apprenticeships are held necessary in almost every art; whilst a long course of study must form the divine, the physician, and the practical professor of the laws; that every man thinks himself born a legislator. "Yet Tully," he continues, "was of a different opinion (De. Leg. 3, 18): '*Est senatori necessarium,*' says he, '*nosse rempublicam; idque late patet; genus hoc omne scientiæ, diligentiae, memoriæ est. Sine quo paratus esse senator nullo pacto potest:*'—it is necessary for a senator to be thoroughly acquainted with the Constitution; and this is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no senator can be possibly fit for his office." (1 Bl. Com. 9, 10.)

The mischiefs that annually arise to the public interests from inconsiderate alterations in the laws are too obvious to escape attention; and it is but too plain that they are, for the most part, owing to the defective education of our law-givers. "The common law of England," says Blackstone, "has fared like other venerable edifices of antiquity, which (requiring in some particulars to be modernized and adapted to the present needs of society) rash and inexperienced workmen have ventured to new dress and refine, with all the rage of modern (innovation, which they term) improvement. Hence, frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies and delays (which have sometimes disgraced the English as well as other courts of justice) owe their original, not to the common law itself, but to innovations that have been made in it by acts of parliament, 'over-laden,' as Sir Edward Coke expresses it, (2 Rep. Pref. ix.) 'with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in the law.' This great and well experienced judge declares that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. 'But if,' he subjoins, 'acts of parliament were after the old-fashion penned, by such only



as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as, also, how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, and the learned should not so often and so much perplex their heads to make atonement and peace by construction of law, between insensible and disagreeing words, sentences and provisoes, as they now do. And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, you may judge how the evil is increased in later times, when the statute-book is swelled to ten times (and now to more than *fifty times*) a larger bulk, unless it should be found that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.'” (1 Bl. Com. 10, 11.)

Mr. Jefferson, who, in conjunction with two of the most eminent jurists of the time (Messrs. Edmund Pendleton and George Wythe), framed, in 1779, the first revision of the laws of Virginia, mentions, with a just satisfaction and pride, that after the labor of two years and a half, they “brought so much of the common law as it was thought necessary to alter, all the British statutes from *Magna Charta* to the present day, and all the laws of Virginia from the establishment of our legislature (or rather from the separation from the mother-country), 4 Jac. I, to the present time, which we thought should be retained, within the compass of one hundred and twenty-six bills, making a printed folio of *ninety pages* only.” (1 Jeff. Mem. 36.) Doubtless the task of these eminent men was materially facilitated by the usage which had prevailed from the origin of the colony, of making periodical revisions of the colonial statute law, thereby improving its scope and design, and simplifying and perfecting its phraseology. It was, notwithstanding, a great triumph of legislation thus to bring within so brief a compass all the enactments necessary for a modern civilized community, and it illustrates the expediency of invoking for such work the maturest wisdom and learning which the society whose laws are to be revised can supply. We have with us in Virginia, in the Revision of 1849, another exemplification of the great value, in the function of law-making, of a large and accurate acquaintance with the common and existing statute-law, as well as of practised ability in their actual applications. The just conception of the whole, and the symmetry of the parts, was in some particulars, appreciably marred after it left the hands of the compilers, Messrs. Patton and Robinson; but in the eyes of well-judging lawyers, it is an enduring me-

morial of the capacity, learning, and honest pains-taking of the distinguished men who framed and marshalled its provisions.

2<sup>b</sup>. Utility of the Study of the Law to *Persons engaged in Mercantile and Mechanical Pursuits.*

To persons engaged in mercantile pursuits, especially to such who conduct them upon a large scale, some knowledge of the principles of what is denominated *mercantile law*, that is, of the law relating to mercantile contracts and transactions, is so indispensable that it is always acquired by such persons to a greater or less extent, although for the most part empirically, and of course superficially, and sometimes at the expense of great losses, which might and would have been avoided by careful instruction in, and the diligent study of, the elements of that branch of the science, even for two or three months.

The mechanical avocations in general demand less imperatively an acquaintance with the rudiments of the law, save only as those avocations trench, as they often do, upon mercantile transactions. But the greater manufacturing operations call for some intimacy, not only with mercantile law, but with sundry departments of the profession besides, such as the law of patents, the law regulating the use of water-power, the law of railroads and other agencies of transportation, the law of mining, &c.

3<sup>b</sup>. Utility of the Study of the Law to *Members of the other Learned Professions.*

Some degree of legal knowledge is so well calculated to discipline the understanding, and to enlarge its scope and capacity, that the study of the law might very well be recommended for that reason alone to all persons who are designed for employments calling specially into action the intellectual powers. The clergyman, the physician, the teacher, and the civil engineer, would certainly each and all be better fitted for their respective callings by some systematic study of the elements of jurisprudence.

The clergyman would find his special account in being able to advise his parishioners in respect to their secular concerns, in those plain cases which often perplex men without inducing them to invoke professional aid, and still more in indicating to them, in more complex matters, the propriety of not proceeding without legal advice. Engaged as he is about the bed of sickness and suffering, a knowledge of the principles which regulate the limitations of property, and the ceremonies attending the making of wills, would not seldom prove of signal advantage to the dying, and to those who survive them.

For the gentlemen of the faculty of physic, Blackstone



observes, "I must frankly own that I see no special reason why they in particular should apply themselves to the study of the law, unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution." (1 Bl. Com. 14.) But since Blackstone wrote, forensic medicine has been publicly recognized as an important branch of legal study; and the converse has also been acknowledged, namely, that medical men should be somewhat informed, at all events as to those departments of the law to which their testimony as experts may relate, and as to what may be required to be proved or adjudged upon their testimony; as in respect to cases of death by apparently doubtful or suspicious means; to cases of unsound mind; to cases of questionable legitimacy; to cases of the birth of a *living* child, with a view to the husband's estate by the curtesy, and the like; and to cases when want of a sufficient disposing power in a last illness might be evident or presumed. The elaborate treatises of the Doctors Beck, of Dr. Taylor, Dr. Ray, and of Messrs Wharton and Stille, afford ample opportunities to the medico-juris-consult to pursue these studies with efficiency and success. (1 Bl. Com. 14, n. 3.)

As no one in human society has more need to acquaint himself with the traits and tendencies of man's nature than the teacher of youth, so to none is the study of the science of the law, whereby mankind seeks to restrain and direct the perverted faculties of the race, more important and desirable, independently of any practical application which may be made of it. But as a well informed teacher is often consulted, by reason of his supposed book-knowledge, about the business and domestic affairs of families, it will not a little increase his usefulness to be so far versed in legal principles as to be enabled to assist his neighbors when but little technical knowledge is required, and to warn them when professional aid should be sought.

The civil and mining engineer, on the other hand, will be none the worse for understanding, in a general way, the law of contracts, of highways and water courses, of mining and of transportation, of patent rights, of mechanics' liens, &c.

- 2<sup>a</sup>. The Causes of the Neglect and the Disuse of the Study of the Law, for many ages, in the Universities of Oxford and Cambridge.

In 1753 Sir William Blackstone, upon the advice of Mr. Murray, who shortly afterwards attained the dignity of Earl of Mansfield, which he has made illustrious, began to read in the University of Oxford lectures upon the laws of England. It was a private adventure, unsustained by academic sanction, but it was eminently successful ; and for the first time since the twelfth century it inaugurated in the chiefest of the national schools, instruction in the laws of the realm, as a branch of liberal education. One of the earliest fruits of the acknowledged excellence of these private lectures, was the author's unanimous election to the first professorship of law, on the foundation established under the will of Charles Viner, the laborious compiler of that "*Abridgment of Law and Equity*," the twenty-four *folio* volumes of which our predecessors read, and we marvel at. To that place he was appointed on the 20th of October, 1758, and five days afterwards, in his thirty-fifth year, he delivered his "Introductory Lecture," which attracted universal applause, and by an enthusiastic biographer is pronounced to be "one of the most elegant and admired compositions which any age or country ever produced." The course which followed did not disappoint the expectation engendered by the "Introduction ;" and in 1765, in order to guard against pirated editions, he himself published the first volume, under the title of *Commentaries on the Laws of England* ; and in the course of the four following years, the other three volumes, thus completing a work, as the same biographer fondly declares, "that will transmit his name to posterity among the first class of English authors, and will be universally read and admired, as long as the laws, the constitution, and the language of this country remain."

It cannot fail to awaken the curious inquiry of the student how it came to pass that in England, a country always governed by law, and supremely jealous of any other government, and a country in which the profession of the law has been ever the open pathway to the highest dignities and employments of the State, the public teaching of that law was sedulously excluded from the two principal seminaries of the land for more than four centuries. To that inquiry let us now address ourselves, and observe, (1), The reasons for the phenomenon assigned by Sir John Fortescue ; and (2), The true reasons ;  
W. C.

- 1<sup>b</sup>. The Reason assigned by Sir John Fortescue for the Neglect and Disuse of the Study of the Common Law, in the Universities of Oxford and Cambridge.

Sir John Fortescue was a very distinguished lawyer of the 15th century, in the reign of Henry VI, and during the exile of that King, whom he followed abroad, was appointed tutor to the King's son, Edward, the Prince of Wales, and

for the use of his royal pupil he is supposed to have composed at that time that most interesting tractate, "*De Laudibus Legum Angliæ*," which gives us the first minute history of the legal institutions of England, and the earliest insight into the professional education and habits of the period; and yet in a manner so brief, and a style so easy and natural, that the most elementary student may peruse it with satisfaction and profit. The prince having inquired "why the laws of England, being so good, so fruitfull, and so commodious, are not taught in the Universities, as the civill and canon lawes are?" receives for answer what Blackstone justly denominates the "jejune and unsatisfactory reason," that "in the Universities, sciences are not taught but in the Latine tongue; and the lawes of England are to be learned in three several tongues, to-witte, in the English tongue, the French tongue, and the Latine tongue. \* \* \* Wherefore, while the lawes are learned in these three tongues, they cannot conveniently bee taught or studied in the Universities, where onely the Latine tongue is exercised." However, the Chief Justice goes on to explain that little material inconvenience resulted from the anomaly, for that there was in the *Inns of Court*, between London and the then suburb of Westminster, in close proximity to the courts held in Westminster Hall, a juridical university of great fame, to which professional lawyers might resort with as much profit as to the teachings of a professor in the Universities. (1 Bl. Com. 16; Fortesc. de laud. ch. 47, 48, 49.)

2<sup>b</sup>. The true Reasons for the Disuse of the Study of the Common Law in the English Universities.

Let us note now Blackstone's more plausible and very instructive account of the causes which led to the banishment of the study of the municipal laws of England from her great Universities.

That ancient collection of unwritten maxims and customs which is called the common law, however compounded, or from whatever fountains derived, had subsisted in England immemorially; and although somewhat altered and impaired by the violence of the times, had in a great measure weathered (save as to landed property), the rude shock of the Norman conquest. It had become greatly endeared to the people in general, as well because its decisions were universally known and familiar, as because it was found excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden (in *Fletam*, 7, 7), in the monasteries, in the Universities, and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so

(like their predecessors, the British Druids), they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus*, is the character given of them soon after the Conquest, in the reign of William II, by William of Malmesbury, (Eng. Chron. B. iv. c. 1). The judges, therefore, were usually created out of the sacred order, as was likewise the case among the Normans; and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day. (1 Bl. Com. 17.)

But the introduction into England of great numbers of foreign clergy, in the reigns of the Conqueror and of his two sons, combined with other circumstances to work a great change in this general reception of and zealous regard for the common law. And we may observe that its exclusion from the principal seats of public education in the two Universities is to be referred to (1), The traditional source of the common law, and its sturdy adherence to the liberty of the subject; (2), The discovery at Amalfi (A. D. 1130), of Justinian's Pandects, and their introduction into England (A. D. 1138), together with an enthusiasm for the Roman law; (3), The devotion of the clergy to the Roman law, and their ascendancy in the Universities; and (4), The establishment of a juridical University in the Inns of Court, near Westminster Hall. (1 Bl. Com. 17 & seq):

W. C.

- 1<sup>c</sup>. The traditional Source of the Common Law, and its sturdy adherence to the Liberty of the Subject.

The common law not being founded on definite enactments, nor indeed deposited in systematic treatises, but being handed down by tradition, use, and experience, and to be learned chiefly by frequenting the courts where it was administered, was abundantly distasteful to the foreign clergy who after the Conquest thronged into England. Its stubborn maintenance of the rights of the subject, its propensities towards self-government, and its disinclination to the exercise of arbitrary power, contributed also to increase the disgust for it felt by the Norman and Italian ecclesiastics, who were solicitous to establish in its room a system of despotic exaction on the one side, and of smooth servility on the other. And this tendency received an impulse in the latter part of the reign of Henry I, the last of the Conqueror's sons, which had nearly completed the extinction of the common law.

- 2<sup>c</sup>. The Discovery at Amalfi, of Justinian's Pandects, and their Introduction into England, together with an Enthusiasm for the Roman Law.

The event which had well nigh proved fatal to the com-

mon law was the accidental discovery, in A. D. 1130, at Amalfi, an obscure town in Italy, of a copy of the Digest or Pandects of Justinian, which had been lost to the world for full five centuries. The civil or imperial Roman law was thus brought into vogue all over the west of Europe, where before it was quite laid aside, and in a manner forgotten, though some traces of its authority remained in Italy and the eastern provinces of the empire. This now became in a particular manner the favorite of the Popish clergy, who borrowed the method and many of the maxims of their canon law from this original. The study of it was introduced into several continental universities, particularly that of Bologna, where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science; and several nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law (being the best written system then extant) as the basis of their several constitutions; blending and interweaving it among their own feodal customs, in some places with a more extensive, in others a more confined authority. (1 Bl. Com. 18.)

Nor was it long before the prevailing mode of the times reached England. For Theobald, a Norman abbot, being elected to the see of Canterbury, and extremely addicted to this new study, brought over with him in his retinue (A. D. 1138) many learned proficients therein; and among the rest Roger, surnamed Vacarius, whom he placed in the University of Oxford, to teach it to the English people. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the continent; and though the *monkish* clergy, devoted to the will of a foreign primate, received it with eagerness and zeal, yet the laity, who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the Common law. King Stephen immediately published a proclamation, forbidding the study of the laws then newly imported from Italy, which was treated by the monks as a piece of impiety; and though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries. (1 Bl. Com. 18, 19.)

3°. The Devotion of the Clergy to the Roman law, and their Ascendency in the Universities of Oxford and Cambridge.

The ecclesiastics having thus begun by signaling their

zealous attachment and devotion to the Roman imperial law, the nation seems from this time to have been divided into two parties, the bishops and clergy, many of them foreigners, who applied themselves wholly to the study of the civil and canon laws, which now came to be inseparably interwoven with each other; and the nobility and laity, who adhered with equal pertinacity to the old common law; both of them reciprocally jealous of what they were unacquainted with, and neither of them, perhaps, allowing the opposite system that real merit which is to be found in each. The clergy extolled the principles of natural and universal justice exhibited by the civil or Roman law in matters of contract and the general transactions of life, whilst the other party denounced the arbitrary and despotic maxims which recommended it as a favorite to the Romish clergy, and rendered it deservedly odious to the people of England. The fundamental principle of the Roman law—*quod principi placuit legis habet vigorem* (Inst. 1, 2, 6,)—cannot be reconciled with our *Magna Charta*, the *judicium parium vel lex terræ*. The irreconcilable conflict between the partisans of the two systems was displayed on more than one memorable occasion, not always to the credit of the advocates of the common law. We find it, on the one hand, in the spleen with which the monastic writers speak of the municipal institutions of England; and on the other, in the defiant temper with which, at the famous parliament of Merton (20 Hen. III, A. D. 1236), the barons responded to the rational proposal of the prelates, to enact that bastards born should be legitimated by the subsequent marriage of their parents,—*una voce responderunt, quod nolunt leges Angliæ mutare!* And we find the same jealousy prevailing more than a century afterwards, but exhibited in a manner more worthy of commendation, when, in 11 Ric. II (A. D. 1388), the nobles declared, with a kind of prophetic spirit, “that the realm of England hath never been unto this hour, neither by the consent of our lord the King, and the lords of parliament, shall it ever be ruled or governed by the civil law.” And of this temper between the clergy and laity many more instances might be given. (1 Bl. Com. 19, & n. (4).)

While things were in this situation, the clergy, finding it impossible to root out the common law, began to withdraw themselves by degrees from the temporal courts; and to that end, very early in the reign of King Henry III, episcopal constitutions or laws were published, forbidding all ecclesiastics to appear *in foro sæculari*, in the temporal courts; nor did they long continue to act as judges there, not caring to take the oath of office—which was then found necessary,



—that they would in all things continue according to the law and custom of the realm of England, though they still kept possession of the legal office of Chancellor, but less than their possession and of a more part of the learning of the times. In short, they had no more power, and afterwards no business connected with it. They modelled the process of the court after the method of the civil law. (1 Bl. Com. 2.)

But whatever error they committed, and whatever their ambition extended, they carried with them the same zeal to improve the state of the law in extension of the common law. In the judicial courts of all the monarchs, the University Courts, and the High Court of Chancery: in all of which the proceedings, and in some of them the rules of procedure, were, this day much more fixed to the civil law. And it is to be observed, that the Universities began about that period to receive their form of academic discipline; that they were then, and till the time of the reformation, governed by the authority under the influence of the Popish clergy. We may perceive the reason why the study of the Roman law was in those days pursued with such alacrity in these seats of learning, and why the common law was despised and neglected. (1 Bl. Com. 21.)

And after the reformation several causes conspired to prevent the municipal law of England from becoming a part of academic education. As first, long usage and established custom, which as in everything else, so especially in the forms of academic exercise, have justly great weight and authority. Secondly, the real interests, merit of the civil law, considered upon the footing of reason, and not of obligation, which was well known to the instructors of our youth, whilst on the other hand they were totally ignorant of the merit of the common law. But the principal reason of all that for so many ages hindered the introduction into the Universities of this branch of learning was, that the study of the common law, having been banished thence prior to the reformation, fell into a quite different channel, and, until Blackstone's experiment, was wholly, and since has been chiefly cultivated in another place. (1 Bl. Com. 21.)

4. The Establishment of a Juridical University in the Inns of Court, near Westminster Hall.

The common law being thus entirely abandoned by the clergy, the study and practice of it devolved of course into the hands of lay-men, who entertained upon their parts a hearty aversion to the civil, and made no scruple to profess their contempt, may even their ignorance of it, in the most public manner. But still, as the balance of learning was greatly on the side of the clergy, and as the common law

was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and over-run by the civil, (a suspicion well justified by the frequent transcripts of Justinian to be met with in Bracton and Fleta,) had it not been for the fixing of the Court of common Pleas, in pursuance of *Magna Charta*, at Westminster, and the consequent assembling there of the principal common law juris-consults; and as the result the institution near by, in a monastic residence once belonging to a religious order, but subsequently known as the *inns of court*, of a seminary of juridical learning, which speedily became a University of scarcely less dignity than its older sisters of Oxford and Cambridge.

The judicial system of England, leaving out of view the local courts, originally consisted of a chief Justiciary and certain assistants, who held their courts always in the hall of the King's palace, at whichever of the royal residences he might for the time being chance to sojourn, (whence it was styled the court of *aula regia*.) This was found to occasion great inconvenience to the suitors in private causes, so that it was made an article in *Magna Charta*, that "common pleas, *i. e.* common causes, should no longer follow the King's court, but be held in some certain place;" in consequence of which they have ever since been held, with some casual exceptions, in the palace of Westminster only. This brought together the students and practitioners of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate pursuit for the amusement of leisure hours, soon raised those laws to that perfection which they suddenly attained under the auspices of the English Justinian, King Edward I. (1 Bl. Com. 22, 23.)

In consequence of this lucky assemblage, they naturally fell in a kind of collegiate order; and being excluded from Oxford and Cambridge, found it necessary to establish a new University of their own. This they did by purchasing at various times, certain houses (now called the Inns of Court and of Chancery) between the city of Westminster, the place of holding the King's courts, and the city of London. Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other Universities in the canon and civil. The degrees were those of *barrister* (first styled apprentices, from *apprendre*, to learn,) who answered to our bachelors: as the state and degree of



a sergeant, *servientis ad legem*, did to that of doctor. (1 Bl. Com. 23.)

The crown seems soon to have taken under its protection this infant seminary of the common law; and the more effectually to foster it, King Henry III, in the nineteenth year of his reign, issued an order to the mayor and sheriffs of London, commanding that no regent of any law school *within* that city should, for the future, teach law therein. (1 Bl. Com. 24.)

In this juridical university (for such it is insisted to have been by Fortescue and Sir Edward Coke), there are two sorts of collegiate houses; one called Inns of Chancery, in which the younger students of the law were usually placed, "learning or studying the originals, and, as it were, the elements of the lawe, who profiting therein, as they grew to ripenesse, so are they admitted into the greater Innes of the same studie, called the Innes of Court." And in these inns of both kinds, he goes on to say, that knights and barons with other noblemen of the realm, did place their children, though they desire not to have them learned in the laws, nor to live by the practice thereof; and that in his time there were about two thousand students at these several inns, nearly all of whom were of noble birth. (1 Bl. Com. 25; 3 Co. Pref. xxxvii; Fortesc. de laud. ch. 49.)

Thus it appears that, although under monkish influences the universities neglected the study of the municipal law of England, yet ample provision was made for it elsewhere, and that in Fortescue's time, (the reign of Henry VI, say A. D. 1460,) it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the law. But by degrees this custom has fallen into disuse; so that in the reign of Queen Elizabeth (say A. D. 1583), Sir Edward Coke (3 Co. Pref. xxxvii.) does not reckon above a thousand students (besides somewhat over three hundred who, in the Inns of Chancery, were engaged with the elements of the law), and in Blackstone's time (say A. D. 1765), the number was very considerably less. For which that writer assigns several reasons; as, first, that the Inns of Chancery were filled by the inferior branch of the profession, (that is, attornies, solicitors, &c.); secondly, because all academic government and superintendence, which in Fortescue's time was vigorous, had ceased to be exercised; and thirdly, because persons of birth and fortune, after completing their academic education at the universities, had seldom the resolution or leisure to enter upon a new scheme of study at another place. (1 Bl. Com. 25-6.)

The Inns of Court at present seem to afford fair facilities

for the acquisition of a liberal knowledge of the law; although the requirements are far inferior to what they formerly were in the palmier days of the University. The system is based upon certain regulations approved by the four societies of the Inns of Court, namely, Gray's Inn, Lincoln's Inn, the Inner Temple, and Middle Temple, and is supervised by a committee known as "The Council of Legal Education," composed of eight *Benchers* (officers so-called), two from each Inn of Court, of which four constitute a *quorum*. Instruction is given by six readers or lecturers, namely, (1), On jurisprudence and civil and international law; (2), On the law of real property; (3), On the common law; (4), On equity; (5), On constitutional law and legal history; and (6), On Hindoo and Mahomedan law, and the law in force in British India. The teaching is done partly by lectures, and partly by interrogation, and the periodical examinations to test proficiency, are by printed and oral questions on books and subjects specified in programme previously issued. In order to be admitted as a student to any of the Inns of Court, one must have passed a public examination at some of the Universities, or must pass an examination on the English language, the Latin language, and English history; and in order to be called to the bar, the student must have attained the age of twenty-one years; must have "*kept twelve terms*;" and must have attended during one whole year the lectures and private classes of two of the readers, or have accomplished an equivalent amount of study under a competent private instructor. But some of these requirements may be dispensed with by the authorities, to a greater or less extent. For the purposes of education, the legal year is divided into *three terms* of unequal length; and what is meant by "*keeping terms*," is *dining* a certain number of days in each term, in the hall of that Inn of Court where one is entered; that is, in the case of those who are at the same time members of any English, Scotch, or Irish university, three days, and in the case of other persons, six. (1 Broom & Hadl. Com. 14, n. (4).)

### 3<sup>a</sup>. The Reasons for Resuming the Study of the Municipal Law at the Universities of Oxford and Cambridge.

Blackstone dilates at some length upon the expediency and importance of restoring the teaching of municipal law to the Universities, as in its elements a fit branch of liberal education, and as a safe and valuable precursor of that more direct and technical instruction necessary for the professional lawyer. It will suffice, however, here merely to sum up the reasons, without enlarging upon them, observing that, while some of these reasons are not applicable to the universities of this

country, yet the benefit of systematic instruction and assistance in the acquisition of the legal elements, in some place of education, is too vital to be overlooked. (1 Bl. Com. 25, & seq.)

- 1<sup>d</sup>. Because in modern times (that is, in Blackstone's time), no systematic instruction is given, nor academic restraint employed at the *Inns of Court*.
  - 2<sup>d</sup>. Because a *new place* of instruction (after completing a course of general education), is unattractive to young men.
  - 3<sup>d</sup>. Because the study of law may sometimes be advantageously blended with academic studies.
  - 4<sup>d</sup>. Because, amid the quiet reflection of the Universities, improvements in the doctrines and processes of the law might often be devised; and
  - 5<sup>d</sup>. Because it would tend to attach to the Universities that peculiarly influential class of men, the legal fraternity.
- 4<sup>a</sup>. The Methods whereby the Study of the Law may be facilitated.

It is an old and true saying, and in no branch of knowledge truer than in the law, that "reading makes the full man, writing the accurate man, and conversation the ready man"; and as fulness, accuracy and readiness are all essential requisites to the really able and successful lawyer, these three agencies may form the prominent texts of the discussion. Before following out those details, however, it will not be amiss to quote the testimony of Sir Edward Coke. "Reading, hearing, conference, meditation and recordation," says he, "are necessary, I confess, to the knowledge of the common law, because it consisteth upon so many, and almost infinite particulars; but an orderly observation in writing is most requisite of them all; for reading without hearing is dark and irksome, and hearing without reading is slippery and uncertain. Neither of them truly yield seasonable fruit without conference, nor both of them with conference, without *meditation and recordation*, nor all of them together without due and orderly observation. *Scribe sapientiam tempore vacuitatis tue*, saith Solomon. And yet he that at length by these means shall attain to be learned, when he shall leave them off quite for his gain, or his ease, soon shall he (I warrant him), lose a great part of his learning; therefore, as I allow not to the student any discontinuance at all (for he shall lose more in a month than he shall recover in many), so do I commend perseverance to all, as to each of these means an inseparable incident." (1 Co. Pref. xxvii, xxviii.)

W. C.

- 1<sup>b</sup>. Reading systematically, Elementary Treatises upon the several Branches of the Law, in order to acquire distinct general Ideas.

All will allow that more or less of *systematic* reading of elementary treatises is an indispensable part of legal education; but there is unhappily a strong tendency to be satisfied with the *less*, and to repudiate the laborious *more*. There is furthermore a disposition which the generous lovers of the profession cannot but deplore, to imagine that no knowledge of anything outside of the law is needful, neither of language, nor science, nor literature, nor history; nay, that within the precincts of the law itself, nothing is worthy of attention but what is actually and directly demanded in the daily practice of the *trade* of an attorney. Liberal preliminary culture is undervalued, and an indiscriminating perusal of one or more text-writers, without any attempt to analyze or arrange their contents, and without habitual reflection upon the propositions contained therein, in order to test their reasonableness, their connexion, or their application, is considered too often as a sufficient preparation for a vocation as thoroughly intellectual as can engage a man's time or powers.

Reading under the direction, and with the constant aid of an instructor, is probably more necessary in the law than in most other subjects of the same recondite nature. Private instruction *may* be not less effective than that of the public teacher, but it ought to be observed, that the mere fact that one reads in a lawyer's office is of little or no value. In order to make it beneficial, there must be daily interrogations of the student, accompanied by abundant expositions of the text, and unceasing efforts on the part of the teacher to cause the pupil to note diversities, to apprehend what is intricate, and above all, to reflect upon whatever he learns, and to digest it. If a private instructor cannot be found able and willing to do this, he who desires the earliest and most complete success in the practice of the profession can do nothing else but resort to a law-school, where this needed systematic and daily instruction will be afforded him.

"The reason of the law is the life of the law," says Sir Edward Coke; "for though a man can tell the law, yet if he know not the reason thereof, he shall soon forget his superficial knowledge. But when he findeth the right reason of the law, and so bringeth it to his natural reason, that he comprehendeth it as his own, this will not only serve him for the understanding of that particular case, but of many others; and this knowledge will long remain with him." "But if by your study and industry you make not the reason of the law *your own*, it is not possible for you long to retain it in your memory." (1 Th. Co. Lit. 2.)

It is much more important to make oneself familiar with a few good text-writers, than to read many cursorily, and



territories; and the text-writers known at that day constituted a mere handful, as compared to the ponderous weight of those under which a modern lawyer's shelves groan. The ancient books of the common law which Coke pronounces "right profitable" are no more than these following, namely, Glanvil, Bracton, Britton, Fleta, Ingham, *Novæ Narrationes* (New Pleadings,) Old Tenures, Old *Natura Brevium*, Littleton, Doctor and Student, Fitzherbert's *Natura Brevium*, and Stamford; to which he adds as auxiliaries, the Abridgments of Fitzherbert, Brooke, and Statham, the Book of Assizes, and for Pleading, the great book of Entries. (3 Co. Pref. vii.)

2<sup>b</sup>. Making Written Abstracts, or *common-placing* of Text-writers, and of cases.

This *common-placing*, or constant use of the pen in condensing and arranging one's acquisitions, is what Lord Coke means by *recording*; and it is impossible to exaggerate the benefit arising from the practice. It tends to clearness and distinctness of apprehension, it dissipates obscurities, it engenders habits of reflection, it encourages and aids the memory, and places in the hands of the student a facility for frequent reviews, which is of itself a highly valuable aid to substantial and thorough acquisition. The student should suffer no book to pass through his hands without being subjected to this process of analysis with the pen.

3<sup>b</sup>. Discussion of Law-points in conversation, and in Debating-clubs.

These conversational discussions (*conferences*, as they are denominated by Sir Edward Coke,) are extremely beneficial to the student when conducted without heat, and with reference to the development of truth. Topics are thus surveyed from on all sides, and one is obliged to consider the reason and grounds of the law with attention, and to note distinctions which might otherwise have escaped him. He learns also to attack and defend opinions, and finds by an early experience what it is expedient for him to recognize, that there are very few doctrines which men may not be found bold enough to question, and that propositions axiomatic to him do not seem equally beyond controversy to others. Great readiness is thus gained in the use of his knowledge, and also of his intellectual faculties; and this to a lawyer is an all important acquisition.

## SECTION II.

## OF THE NATURE OF LAWS IN GENERAL.

## II. The Nature of Laws, in general; W. C.

1<sup>a</sup>. The definition of Law in its most comprehensive sense.

Law in its most comprehensive sense, is a rule of action for intelligent beings, and in its practical and more limited sense for *men*. (1 Bl. Com. 39, and n (1).)

2<sup>a</sup>. The several kinds of Law; W. C.1<sup>b</sup>. The Divine Law.

The divine law is prescribed by Divine authority. It is founded partly on the law of Nature as discovered by reason, and in part on Revelation. (1 Bl. Com. 41-'2.)

2<sup>b</sup>. Human Law.

Human law is prescribed by human authority;  
W. C.

1<sup>c</sup>. International Law.

International law is the system of rules which regulates the intercourse and determines the rights and obligations of sovereign States. It is founded partly on the Divine law, as discerned by reason, or disclosed by revelation, and in part on mutual agreements, express or implied. The expositors of International law are approved text-writers, adjudications of International tribunals, (such as prize-courts, and courts of mixed commission, or boards of arbitration,) official opinions of professional advisers of government, &c. (1 Bl. Com. 43; Wheat. Internat. Law, 47.)

2<sup>c</sup>. Constitutional Law.

Constitutional law contains the doctrines and principles which relate to the organization of government in general, and of the governments of the United States, and of Virginia, in particular. (Montesquieu's Spirit of Laws; Sidney on Government; Federalist; 2 Rives' Life, &c., of Madison; 5 Elliot's Debates; Virginia Report, 1799-1800.)

3<sup>c</sup>. Municipal Law; W. C.1<sup>d</sup>. The definition of municipal law; W. C.1<sup>o</sup>. Blackstone's definition of municipal law.

"A rule of civil conduct, prescribed by the *supreme* power in a State, *commanding what is right, and prohibiting what is wrong.*" (1 Bl. Com. 44.)

2<sup>o</sup>. Objections to Blackstone's definition; W. C.1<sup>f</sup>. It ascribes laws to the *supreme* power in a State.

According to the just theory of government, as propounded by Montesquieu, neither of the three departments can be *supreme*, without destroying liberty. (Montesq. Sp. Laws, B. XI, c. 6.) The legislative department, therefore, is not necessarily, and ought never

to be, supreme, and in Virginia is not so. It is simply the *law-making* department.

- 2<sup>r</sup>. The latter clause, "commanding," &c., is either superfluous or erroneous.

If right and wrong are referred to the municipal law itself, then whatever it commands is *right*, and what it prohibits is *wrong*, and in that case the clause is *insignificant tautology*. But if right and wrong are to be referred to the law of God, as demonstrated by reason, or by revelation, then the clause is *erroneous*, or at least *deficient*; for though the municipal law may seldom or never *command* what is wrong, yet in multitudes of instances it *forbids* what, apart from the prohibition, is right; that is, *not wrong*. (1 Bl. Com. 44, n (5).)

- 3<sup>o</sup>. A preferable definition of municipal law.

"A rule of civil conduct, prescribed by the law-making power in a State." (1 Kent's Com. 447.)

- 4<sup>o</sup>. The several particulars contained in the definition.

These several particulars will lead us to observe that (1), Municipal law is a *rule*; (2), A rule of *civil conduct*; (3), A rule *prescribed*; and (4), A rule prescribed by the *law-making power* in a State;

W. C.

- 1<sup>r</sup>. Municipal Law is a *Rule*; W. C.

- 1<sup>s</sup>. It is *permanent, uniform, and universal*,—and not *fluctuating, nor transient*, like an order.

Hence *private* legislative acts do not conform to the proper idea of a *law*, and are to be therefore deprecated. The occasion for them is much circumscribed in Virginia, by the abolition of estates-tail, and by committing the interests of infants, lunatics, etc., to the Courts of Equity. (V. C. 1873, ch. 112, § 9; Id. ch. 124, § 1 to 12; Va. Const. 1869, Art. V, § 20.)

- 2<sup>s</sup>. It is *coercive*—not merely *advisory*.

- 3<sup>s</sup>. It *commands*—and does not *depend on assent*. (1 Bl. Com. 44.)

- 2<sup>r</sup>. Municipal Law is a Rule of *Civil Conduct*; W. C.

- 1<sup>s</sup>. It relates to *conduct*—not to *opinion or faith*.

- 2<sup>s</sup>. It relates to *civil conduct*—conduct as a *citizen*,—not *moral conduct*.

(1 Bl. Com. 45.)

- 3<sup>r</sup>. Municipal Law is a Rule *prescribed*.

Hence *retrospective* laws do not fully correspond with the definition of a law, since they have for their subject one's *past conduct*. They are sometimes void, and are never favored; nor in construing a law can a retro-active effect be allowed, unless it be in express terms



retro-active. (1 Bl. Com. 45-'6; 1 Tuck Com. 3, B. I; Elliott's Ex'or v. Lyell, 3 Call, 277; Com'th v. Hewet, 2 Hen. & M. 181; Gaskins v. Com'th, 1 Call, 197; Baugher v. Nelson, 9 Gill, 299; Potter's Dwar. Stats. 162-'3, & seq., and n (9) );  
W. C.

1<sup>st</sup>. The several classes of Retrospective Laws.

The classes of retrospective laws include, (1), Retrospective laws touching crimes; (2), Retrospective laws touching civil rights; and (3), Retrospective laws touching civil remedies;

W. C.

1<sup>h</sup>. Retrospective Laws touching *Crimes*.

These are called *ex post facto* laws; they are laws which make an act punishable in a manner in which it was not punishable when committed; or which change the rules of evidence so that less or different testimony is required to convict. (Fletcher v. Peck, 6 Cr. 87; Cummings v. Missouri, 4 Wal. 277; Synops. Crim. L. 8.)

*Ex post facto* laws are prohibited both to the States and to Congress. (Va. Const. 1869, Art. V, § 14; U. S. Const. Art. I, § x, 1; Id. § ix, 3; Federalist, Nos. 44, 84; 2 Stor. Const. § 1373, 1345; *Ex-parte* Garland, 4 Wal. 333; Cummings v. Missouri, 4 Wal. 277.)

2<sup>h</sup>. Retrospective Laws, touching *Civil Rights*.

Laws *impairing the obligation of contracts* are prohibited to the States by the Federal Constitution, and to Virginia by that of the State. (U. S. Const. Art. I, § x, 1; Va. Const. 1869, Art. V, § 14; Hepburn v. Griswold, 8 Wal. 603; Legal Tender Cases, 12 Wal. 457; Homestead Cases, 22 Grat. 266; Antoni v. Wright, Id. 833; Gunn v. Barry, 15 Wal. 610.)

Other retrospective laws *touching rights* are objectionable, and they are never construed retrospectively, unless in pursuance of *express words*; but they are not void. (Baugher v. Nelson, 9 Gill, 299; Elliott's Ex'or v. Lyell, 3 Call, 279; Com'th v. Hewet, 2 Hen. & M. 181; Gaskins v. Com'th, 1 Call, 197; Day v. Pickett, 4 Munf. 109; Satterlee v. Mathewson, 2 Pet. 380; Bac. Abr. Stat. (C.); Drehman v. Stifle, 8 Wal. 603, and cases cited; Watson & als. v. Mercer, 8 Pet. 110; Balt. & Susq'h R. R. Co. v. Nesbit & als., 10 How. 401-'2; Duval v. Malone, 14 Grat. 28.)

3<sup>h</sup>. Retrospective Laws touching *Civil Remedies*.

Retrospective laws touching civil remedies are not only admitted to be valid, but are comparatively free from objection, unless they materially affect the obli-

*gation of contracts*, in which case they are void. The reason why retrospective laws touching *remedies* are viewed with so much more leniency than when they relate to *rights* seems to be that, in the nature of things, remedies must be frequently changed in order to subserve the convenience of society; and if the practitioner were obliged to remember what remedy was applicable, having reference to the date of the cause of action, greater embarrassments would result than from allowing the statute which alters a remedy to have a retro-active effect. (Bronson v. Kinzie & als., 1 How. 311; McCracken v. Haywood, 2 How. 645; Von Hoffman v. City of Quincy, 4 Wal. 548; Quackenbush v. Danks, 1 Denio, 128; 3 Do. 594; State v. Carew, 13 Richardson (Law), 506; Taylor v. Stearns & als., 18 Grat. 244, 262, 272.)

But even as to *remedies*, a retrospective effect is not allowed to any law, unless such effect be clearly contemplated by the legislature. (Baughner v. Nelson, 9 Gill, 299; Elliott's Ex'or v. Lyell, 3 Call, 279, & seq.; Bac. Abr. Stat. (C.); Duval v. Malone, 14 Grat. 28.)

2<sup>s</sup>. The time whence Laws take effect; W. C.

1<sup>h</sup>. Doctrine at Common Law.

Statutes took effect, at common law, from the first day of the session of parliament at which they were enacted, unless another day were named. (Rex v. Thurston, 1 Lev. 91; Latless & als. v. Holmes, 4 T. R. 660; Bac. Abr. Stat. (C).)

2<sup>h</sup>. The modern English Rule.

Statutes take effect from the time they receive the Royal assent, if no other day is specified. (Stat. 33 George III, c. 13; 1 Bl. Com. 185, n (77).)

3<sup>h</sup>. Rule in Virginia.

Statutes take effect from 1 July ensuing their enactment, if no other day be specified. (V. C. 1873, ch. 15, § 3.) But generally it is specified that they shall be in force from the day of their *passage*, which it is presumed means their *approval by the Governor*, or their enactment over his *veto*. (Va. Const. 1869, Art. IV, § 8.)

4<sup>h</sup>. Rule in respect to United States Statutes.

They take effect from the time they receive the President's approval, or are passed over his *veto*, if no other day is specified. (1 Bright. Dig. 846, § 4; Id. 20, § 1.)

3<sup>s</sup>. Mode of Publication of Laws; W. C.

1<sup>h</sup>. Mode of publication, at Common Law.

Before the invention of printing, laws were pub-

lished by the sheriff of every county (in pursuance of the king's writ, sent at the end of every session, together with a transcript of the acts), by proclaiming them at his county court, and keeping them there, for copies to be made by all who chose. Since the invention of printing, by publication by the king's printer, and distribution of the printed copies through the realm. (1 Bl. Com. 185, and n (78).)

2<sup>h</sup>. Mode of publication in Virginia.

In colonial times, copies of the statutes were read publicly, on the first day of the "*mounthlie corts*," and were kept in those courts to be read by all who desired it. (1 Hen. Stats. 177.) At present printed copies are distributed to every judge, justice, and clerk of any court in the State; to every attorney for the Commonwealth, and to every sheriff and sergeant, besides to a great number of other public officers, and public institutions. (V. C. 1873, ch. 15, § 4 to 14.)

3<sup>h</sup>. Mode of publication of the United States Statutes.

The Statutes of the United States are published under direction of the Secretary of State, in one newspaper of the District of Columbia, and in not more than two in each State and Territory, and pamphlet-copies distributed to the various officers of the United States, and amongst the several States and Territories in proportion to the number of their representatives in Congress. (1 Bright Dig. 20 to 22, § 1, 4 to 6.)

4<sup>r</sup>. By the *law-making* power in a State;  
W. C.

1<sup>s</sup>. The Nature of Society, and of Civil Government.

Society was ordained by God, who created mankind with such wants and affinities that they cannot exist without it. And as society cannot exist without restraints, and some agency to enforce them, God ordained government also. (1 Bl. Com. 47-48; Exod. xviii. 20; Deut. xvi. 18-20; Prov. viii. 15; Rom. xiii. 1-4).

2<sup>s</sup>. The qualities which *ought* to characterize Government.

Government ought to possess *wisdom* to discern the real interest of the community; *goodness* to endeavor to pursue it; and *power* to carry such knowledge and intention into effect. (1 Bl. Com. 48.)

3<sup>s</sup>. The different Forms of Government;  
W. C.

1<sup>h</sup>. The Simple Forms of Government.

1 Bl. Com. 49, &c.;

W. C.

1<sup>i</sup>. Democracy.

Where the government is lodged in an assembly consisting of all the free members of the community.

Abounds in *honesty of intention* (towards itself), and in patriotic zeal, but is wanting in wisdom to devise, and in energy to execute. (1 Bl. Com. 49.)

2<sup>i</sup>. Aristocracy.

Where the government is lodged, not by delegation, but by inherent authority, in a counsel, composed of select members.

Excels in *wisdom* of design, but is wanting in honesty of purpose, and in vigor of execution. (1 Bl. Com. 49, 50.)

3<sup>i</sup>. Monarchy.

Where all power is entrusted to a single person.

Distinguished for vigor and concentration of purpose, but is apt to be deficient in honesty of design, and in wise providence. (1 Bl. Com. 49, 50.)

2<sup>b</sup>. The Mixed Forms of Government;

W. C.

1<sup>i</sup>. The English Constitution;

1 Bl. Com. 50, 51.

W. C.

1<sup>k</sup>. Element of Monarchy.

The King.

2<sup>k</sup>. Element of Aristocracy.

The House of Lords.

3<sup>k</sup>. Element of Democracy.

The House of Commons, constituting the *Representative-feature*—the modern substitute for Democracy, and divested of several of its defects.

2<sup>i</sup>. The American Constitutions;

W. C.

1<sup>k</sup>. Element of Monarchy.

The President, and Governors of States.

2<sup>k</sup>. Element of Aristocracy.

Wholly wanting.

3<sup>k</sup>. Element of Democracy.

The Chambers of Legislature, embracing the *representative feature*; and divided into two bodies (sometimes, as in Congress, based on different principles), whereby the undue superiority which naturally attaches to the law-making power is counteracted, greater deliberation is secured, and the representation of different interests may be obtained.

4<sup>a</sup>. The obligation of every society to cause the best laws possible to be enacted.

Every State is bound to *preserve and perfect* itself. (Vat. B. I. § 14 to 37.)

2<sup>d</sup>. The several parts of a Law; W. C.

1<sup>o</sup>. Declaratory and Directory parts.

1 Bl. Com. 53 to 55.

2<sup>o</sup>. Remedial part.

1 Bl. Com. 56.

3<sup>o</sup>. Vindictory part.

Containing the *sanction*, which is always necessary to cause obedience, and proposing *punishment*, rather than *rewards*. (1 Bl. Com. 56-'7.)

3<sup>d</sup>. The Obligation to obey the Laws.

It is a *conscientious* obligation, whether the law relate to a thing *malum prohibitum*, or *malum in se*; for without obedience, society (which is a divine ordinance) cannot exist. (1 Bl. Com. 58, and n (8).) And this deduction of reason is confirmed by the Scripture precepts, "Submit yourself to every ordinance of man, for the Lord's sake," (1 Pet. ii. 13); "Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God," (Rom. xiii. 1); "Wherefore, ye must needs be subject, not only for wrath, but also for conscience sake," (Rom. xiii. 5.)

4<sup>d</sup>. The Interpretation of Laws; W. C.

1<sup>o</sup>. The Method of Interpretation employed in the Roman Law.

By reference to the Prince, who was the *law-giver*. This is at war with the just and necessary distribution of powers in a well-ordered government, and is the essence of tyranny. (Montesq. Sp. of L., B. XI, c. VI.; Va. Const. 1869, Art. II.)

2<sup>o</sup>. The signs whereby to interpret the will of the law-giver.

1 Bl. Com. 69;

W. C.

1<sup>o</sup>. The Words.

Words are to be taken in their usual and popular sense, except when they are *technical*, and then according to the acceptance of the learned in the art. (1 Bl. Com. 59.)

2<sup>o</sup>. The Context.

The context is very important in ascertaining the meaning. Thus the preamble often helps the construction, as do other parts of the same law, or other laws in *pari materia*. (1 Bl. Com. 60; Bac. Abr. Stat. (I). 3; Dillard v. Tomlinson, 1 Munf. 206; Ailesbury v. Patteson, 1 Dougl. 27.)

3<sup>f</sup>. The subject matter.

Words are to be always understood as having regard to the *subject matter*; *e. g.*, Stat. Edw. III, prohibiting the "purchasing of *provisions* at Rome." (1 Bl. Com. 60.)

4<sup>f</sup>. The Effects and Consequences.

An absurd conclusion, or one productive of *general* inconvenience, is a strong argument against the interpretation which leads to it. The *argumentum ab inconvenienti* is powerful in law. Thus a law "forbidding the drawing of blood in the streets," is not to be construed to apply to a surgeon who bleeds a man in a fit, &c. (1 Bl. Com. 60; 1 Th. Co. Lit. 18, 19, & n (10).)

5<sup>f</sup>. The Reason and Spirit of the law.

The *cause* which moved the legislature to enact the law, is always potent to determine its meaning, if the words are dubious. (1 Bl. Com. 61);

W. C.

1<sup>g</sup>. Natural Equity.

Natural equity is the mode of interpreting laws by the *reason* of them, or the "correction of that wherein the law (by reason of its universality), is deficient," (1 Bl. Com. 61); which must by no means be confounded with *technical equity*, so familiar to English and American lawyers.

2<sup>g</sup>. Technical Equity, as known to English and American Jurisprudence; W. C.1<sup>h</sup>. Definition of Technical Equity.

Technical equity is that portion of remedial justice which is exclusively administered in Courts of Equity, in contradistinction to that portion of remedial justice which is exclusively administered by Courts of Common law. (1 Stor. Eq. § 25.)

2<sup>h</sup>. Principal Distinctions between Courts of Equity and Courts of Common Law;

(1 Stor. Eq. § 26 to § 33; 3 Bl. Com. 430 & seq.; Id. 436 &c.; Fonbl. Eq. 7, n (e);

W. C.

1<sup>i</sup>. Difference in the *Rights which they recognize*.

*e. g.*, Trusts, and other Equitable Estates, Mistakes, Frauds, Unconscionable Bargains, &c. (1 Stor. Eq. § 26 to 29.)

2<sup>i</sup>. Difference in the *Forms of Remedy they apply*.

Thus a Court of Equity grants an *injunction* to prevent an irremediable injury; *coerces a disclosure* on oath; enforces *specific performance* of contracts, &c. (1 Stor. Eq. § 26 to 28, 31.)

3<sup>d</sup>. Difference in the *Modes of proceeding* they adopt.

Thus a Court of Equity tries questions of fact without a jury, by the court; upon testimony never oral, but always in the shape of depositions, &c. (1 Stor. Eq. § 31.)

## SECTION III.

## OF THE LAWS OF ENGLAND.

## The Laws of England.

Laws of England consist of (1), The *lex non scripta* (unwritten law), or common law; (2), The *lex scripta*, or statute law; and under this head may also be mentioned, (3), The law of Virginia;

the *lex non scripta*, (unwritten law,) or common law.

The common law, in its most comprehensive sense, embraces *general customs*, pervading the whole realm, *particular customs*, prevailing only in certain places, and *particular laws*, which have been by degrees incorporated into the common law, to a certain extent. But in its more ordinary acceptation, common law includes only *general customs*, and *particular laws*, and not customs of particular places. It is in this sense that the common law has been introduced into Virginia. Bl. Com. 62; V. C., 1873 ch. 15, § 1;

C.

Why called *lex non scripta*.

Not because it is at present *oral*, and is transmitted only by tradition, but because its original institution is not set down in writing, like statutes;—the monuments and evidences thereof being contained in the records of courts of justice, in books of reports of judicial decisions, and in text-books of authority. (1 Bl. Com. 63-4; Hale's Hist. Com. law, 1, 2.)

The rise and original of the *lex non scripta*, or common law; W. C.

*Dome-Book*, or *Liber-Judicialis* of Alfred.

This book was compiled by Alfred, from the various local customs of the several provinces of his kingdom, say A. D. 890. It was extant so late as the time of Edward V, (say A. D. 1461), but is now lost. (1 Bl. Com. 64-'5; Reeves' Hist. Eng. Law, 25.)

Resolution of Alfred's Code into three systems of laws, about A. D. 1000.

1 Bl. Com. 65; 1 Reeves' Hist. Eng. Law, 25-'6; Hale's Hist. C. L. 53-'4.

W. C.

1<sup>d</sup>. *Mercen-Lage*,—or Mercian Laws.

Prevailing in many of the mid-land counties, and in those bordering on Wales.

2<sup>d</sup>. *West-Saxon Lage*,—or West-Saxon Laws.

Prevailing in the South and West, from Kent to Devonshire.

3<sup>d</sup>. *Dane-Lage*,—or Danish Law.

Maintained in the rest of the mid-land counties, and on the Eastern coast.

3<sup>c</sup>. Digest of Edward *the Confessor*, say A. D. 1041.

A new edition, it would seem, of Alfred's *Dome-book*, with additions and improvements. Hence Edward is styled the *Restitutor*, as Alfred is the *legum Anglicanarum Conditor*; and the law thus systematized, is known as *jus commune*, or *Folc-rihte*. (1 Bl. Com. 66; 1 Reeves' Hist. E. L., 25-'6; Hale's Hist. C. L. 5, n (B), 53-'4.)

3<sup>b</sup>. The several parts of the *lex non scripta*, or common law.

The several parts of the common law include, (1), General customs; (2), Particular customs; and (3), Particular laws, that is, the civil, or Roman, and the canon laws;

W. C.

1<sup>c</sup>. General Customs,—or the common law, more usually so called.

1 Bl. Com. 67 and seq.

Founded on immemorial and universal usage, evidenced by judicial decisions, and approved text-writers. The common law consists largely of statutes worn out by time, according to Ld. Hale. (Hale's Hist. of Com. Law, & seq. 89; Bac. Abr. Statute); W. C.

1<sup>d</sup>. Effect of Judicial Decisions in ascertaining the Law.

Precedents must be observed and respected when they have been acted on as the basis of transactions of business, because of the unendurable inconvenience which otherwise would ensue from the uncertainty. (1 Bl. Com. 69 to 71.)

2<sup>d</sup>. The subjects to which *General Customs*, or the Common Law, relate.

The common law relates to and determines the form and obligation of contracts, estates in real property, marital rights of husband and wife, civil remedies, the general doctrine of crimes and punishments, &c. (1 Bl. Com. 68.)

3<sup>d</sup>. Depositaries of the Common Law.

1 Bl. Com. 71 to 73, and 72, n (10); 1 Reeve's Hist. Eng. Law, 221; 2 Do. 86, 279; 1 Kent's Com. 470, &c.; W. C.

1<sup>e</sup>. Reports of adjudged Cases.



- 1 Kent's Com. 470, 498; 1 Bl. Com. 71-'2; Wallace's Report;  
W. C.
- 1<sup>f</sup>. The Year-Books.  
From 1 Edw. I to 28 Hen. VIII. (A. D. 1307 to 1537)
- 2<sup>f</sup>. Coke's Reports.  
From Elizabeth to James I.
- 3<sup>f</sup>. Croke's Reports.  
From Elizabeth to Charles I.
- 4<sup>f</sup>. Dyer's Reports.  
From Henry VIII to Elizabeth.
- 5<sup>f</sup>. Plowden's Reports.  
From Edward VI to Elizabeth.
- 6<sup>f</sup>. More modern Reports.
- 2<sup>e</sup>. Approved Text Writers; W. C.
- 1<sup>f</sup>. Glanvil—"Treatise on the Laws and Customs of England."  
Written *temp.* Henry II,—say A. D. 1187.
- 2<sup>f</sup>. Bracton—"Treatise of the Laws and Customs of England."  
Written *temp.* Henry III,—say A. D. 1265.
- 3<sup>f</sup>. Fleta—"Commentary upon the English Law."  
Written *in the Fleet prison*, *temp.* Edward I,—say A. D. 1285.
- 4<sup>f</sup>. Littleton's Tenures.  
Written *temp.* Edward IV,—say A. D. 1475.
- 5<sup>f</sup>. Brooke's Grand Abridgment of the Law.  
Written *temp.* Elizabeth,—say A. D. 1573.
- 6<sup>f</sup>. Fitzherbert's Grand Abridgment of the Law.  
Written *temp.* Elizabeth,—say A. D. 1565.
- 7<sup>f</sup>. Coke's Institutes.  
Written *temp.* James I and Charles I,—A. D. 1621 to 1634;  
W. C.
- 1<sup>g</sup>. First Institute.  
"Commentary on "Littleton's Tenures,"—A. D. 1621.
- 2<sup>g</sup>. Second Institute.  
Commentary on Ancient Statutes,—A. D. 1629 to 1634.
- 3<sup>g</sup>. Third Institute.  
Treatise of Pleas of the Crown,—A. D. 1629 to 1634.
- 4<sup>g</sup>. Fourth Institute.  
Treatise on the Jurisdiction of Courts,—A. D. 1629 to 1634.
- 2<sup>c</sup>. Particular Customs.

Particular customs are such customs as do not prevail throughout the kingdom, but affect only the people of particular districts, or particular classes of persons. (1 Bl. Com. 74, & seq.);

W. C.

1<sup>d</sup>. Instances of Particular Customs; W. C.

1<sup>o</sup>. Custom of Gavelkind.

Prevailing in Kent and some other places,—that *all* the sons shall succeed to the inheritance alike, &c. (1 Bl. Com. 75; 2 Do. 84.)

2<sup>o</sup>. Custom of Borough-English.

Prevailing in divers ancient boroughs,—that the *youngest son* shall be heir, &c. (1 Bl. Com. 75; 2 Do. 83.)

3<sup>o</sup>. Copyhold Customs.

1 Bl. Com. 75; 2 Do. 95, & seq.; Id. 147, & seq.

2<sup>d</sup>. Rules relating to Particular Customs.

These rules are such as relate (1), To the proof of the custom; (2), To the legality of the custom; and (3), To the allowance of the custom. (1 Bl. Com. 76.)

W. C.

1<sup>o</sup>. Rules touching the *Proof* of Particular Customs; W. C.

1<sup>f</sup>. Rules touching Proof of Gavelkind and Borough-English.

There is no need to prove that the custom exists, but only that the lands in question are subject thereto. Trial is by a jury, and not by the court.

2<sup>f</sup>. Rules touching the Proof of Customs of London.

Proved by *certificate* from the Lord Mayor and Aldermen, by the mouth of the Recorder, and not tried by the jury.

3<sup>f</sup>. Rules touching the Proof of all other Private Customs.

They must be particularly *pleaded*, and as well the existence of the custom must be proved, as that the thing in dispute is within it. Trial is by jury.

2<sup>o</sup>. Legality of Particular Customs.

“*Malus usus abolendus est.*” (1 Bl. Com. 76, &c). We may note under this head, (1), The requisites of a good custom; (2), The legality of customs in Virginia; and (3), The contrast between custom and prescription;

W. C.

1<sup>f</sup>. The Requisites of a Good Custom.

1 Bl. Com. 76, &c.

1<sup>s</sup>. Long continued.

In order to be supported as a good custom, it must appear to have continued so long that the *memory of man runneth not to the contrary.* (1 Th. Co. Lit. 35.)

Immemorial continuance is presumed from *regular usage for twenty years*, not explained, or contradicted. (King v. Joliffe, 2 B. & C. (9 E. C. L.) 54.)

2<sup>s</sup>. Uninterrupted.

At least in point of *Right*.

3<sup>s</sup>. Peaceable and acquiesced in.

4<sup>s</sup>. Reasonable; *i. e.*, not unreasonable.

Thus, even if there could be in Virginia (as there cannot), a valid custom or usage operating as an exception to the general rules of the common law, a custom or usage for a flour inspector, who by statute is to receive a specified compensation in money, to take to his own use the flour drawn from the barrel in the process of inspection, called the draft-flour, as an additional compensation or perquisite, would be bad, as unreasonable, unjust, and contrary to law. (Delaplane v. Crenshaw, 15 Grat. 457).

5<sup>s</sup>. Certain.

*Id certum est, quod certum reddi potest.*

6<sup>s</sup>. Compulsory.

7<sup>s</sup>. Consistent with other customs.

2<sup>t</sup>. The Legality of Customs in Virginia.

Customs, as *local laws*, cannot exist in Virginia, because, when our ancestors came hither in 1607, they brought with them the *universal* common law, but no particular custom; and so every local custom now alleged to exist must have *originated since that period*, and therefore within the historic memory of man. (Harris v. Carson, 7 Leigh, 632; Mason v. Moyers, 2 Rob. 606; Delaplane v. Crenshaw, 15 Grat. 457.)

Let it be observed that the doctrine just stated does by no means exclude the effect of usage or custom in proving or modifying contracts, either express or implied. Contracts are generally made with more or less reference to existing custom or usage, and although, where the agreement is *in writing*, it may not be altered by proof of any such custom, save where the terms are ambiguous, yet having due regard to that rule of evidence, usage and custom are powerful auxiliaries to help us to the meaning of the parties. (Governor for, &c. v. Withers, 5 Grat. 24; Delaplane v. Crenshaw, 15 Grat. 457; Ragland & Co. v. Butler, 18 Grat. 336-7.)

3<sup>t</sup>. Contrast between Custom and Prescription.

Custom is a *local law*; prescription a *source of private title to property*.

Both depend on *immemorial continuance*. In both, twenty years adverse, honest, uninterrupted continuance is proof of immemorial duration.

Custom as a *local law* cannot exist in Virginia, for the reason stated on the preceding page. Prescription may, because there is no historic date for the introduction of *property*, as there is for the introduction of *law*. (Coalter v. Hunter, 4 Rand. 38; Nichols v. Aylor, 7 Leigh, 546; 3 Kent's Com. 441; 1 Lom. Dig. 673.)

3°. Allowance of Particular Customs; W. C.

1<sup>f</sup>. Customs (being in derogation of the common law) must be construed strictly.

1 Bl. Com. 78,—'9.

2<sup>f</sup>. Customs must submit to the King's Prerogative.

1 Bl. Com. 79.

3°. Particular Laws;

Let us observe under this head, (1), What particular laws are admitted as part of the common law; (2), The several courts wherein they are used; and (3), The restraints upon their employment;

W. C.

1<sup>d</sup>. What particular laws are admitted as part of the *lex non scripta*.

The particular laws which have been partially adopted as part of the common law, but with a number of cautious restrictions, are the Roman or civil law, and the canon or ecclesiastical law. (1 Bl. Com. 79 & seq.)

W. C.

1°. The Roman or Civil Law.

1 Bl. Com. 80, 81.

W. C.

1<sup>f</sup>. The sources whence the Roman law was compiled.

The sources whence the Roman law was compiled may be enumerated as follows; namely,

(1). The regal constitutions of their ancient kings;

(2). The XII. tables of the *Decemviri*;

(3). The laws enacted by the senate or people;

(4). The edicts of the Prætor;

(5). The *responsa prudentum*, or opinions of learned lawyers; and

(6). The imperial decrees, or constitutions of successive Emperors.

1 Bl. Com. 80, 81.

2<sup>f</sup>. The parts of which the Roman law (the *Corpus Juris civilis*) consists; Wherein of

1<sup>g</sup>. The Institutes of Justinian. .

An elementary treatise for the use of beginners, compiled by Tribonian, a great jurist of the time, under the order of the Emperor Justinian, about A. D. 533.

2<sup>g</sup>. The Pandects, or Digest of Justinian.

A *digest*, in 50 books, of the general doctrines of the Roman law, compiled with great labor and success, by

Tribonian, under the order of Justinian, about A. D. 533. It contains the opinions of the most eminent jurists of the Roman world, digested with admirable system, upon all subjects connected with the municipal law of the empire.

Within less than a century after its completion, it disappeared, and was lost to the world for nearly 600 years, when a copy of it was casually found at *Amalfi*, in Italy, about A. D. 1130.

3<sup>a</sup>. Code of Justinian.

A new collection of imperial enactments, or constitutions, compiled by Tribonian, about A. D. 533.

4<sup>a</sup>. Novels or New Constitutions.

Being a Supplement to the Code, containing new decrees of successive Emperors.

☞ These four compose the *Corpus Juris civilis*.

3<sup>f</sup>. Popular Expositions of Roman or Civil Law; Wherein of

1<sup>s</sup>. Gibbon's History of the Decline and Fall, &c, ch. 44.

2<sup>s</sup>. Browne's Civil and Admiralty Law,—Vol. I.

3<sup>s</sup>. Taylor's Civil Law,—p. 1 to 25.

4<sup>s</sup>. Kent's Com's,—Vol. I, p. 515.

5<sup>s</sup>. Cooper's Justinian.

2<sup>o</sup>. The Canon Law.

The canon law embraces the whole body of Roman Ecclesiastical Law. (1 Bl. Com. 82, & seq.) Let us observe, (1), Whence the Canon law was originally compiled; and (2), The depositaries of the Canon law;

1 W. C.

1<sup>f</sup>. Whence the Canon Law was compiled originally.

From opinions of ancient Latin Fathers,—the Decrees of General Councils,—and the Decretal Epistles, and Bulls of the Papal See.

2<sup>f</sup>. Depositaries of the Canon Law; W. C.

1<sup>s</sup>. The Concordia discordantium Canonum, or Decretum Gratiani, A. D. 1151 (3 books).

2<sup>s</sup>. The Decretalia Gregorii Noni, A. D. 1230 (5 books).

3<sup>s</sup>. The Sextus Decretalium, A. D. 1298 (1 book).

4<sup>s</sup>. The Clementine Constitutions, A. D. 1317.

5<sup>s</sup>. The Extravagantes Johannis, say A. D. 1320.

6<sup>s</sup>. The Extravagantes Communes.

☞ These six constitute the *Corpus Juris Canonici*.

7<sup>f</sup>. Legatine Constitutions.

The legatine constitutions are the constitutions from time to time enacted in the English National Synods, *Temp.* Henry III, A. D. 1220 to 1268, under Otho and Othobon, Legates from Gregory IX, and Clement IV.

8<sup>f</sup>. Provincial Constitutions.

The provincial constitutions embrace the decrees of Provincial Synods held under divers Archbishops of Canterbury, from Henry III to Henry VIII. By 25 Henry VIII, it was enacted that there should be a review of the canon law; and until it was made that all canons, constitutions, ordinances, and synodals provincial, then made and not repugnant to the law of the land, should be in force. And on this statute (no such review having ever been made) now depends the authority of the canon law in England. (1 Bl. Com. 83.)

- 2<sup>d</sup>. The several Species of Courts wherein (under restrictions) the Civil and Canon Laws are permitted to be used.

1 Bl. Com. 83, & seq.

W. C.

1<sup>o</sup>. The Courts Christian, or Ecclesiastical Courts.

2<sup>o</sup>. The Military Courts.

3<sup>o</sup>. The Courts of Admiralty.

4<sup>o</sup>. The Courts of the two Universities.

The civil and canon laws are used in Virginia in—

1. *Causes Testamentary and Matrimonial*;

2. The Military Courts—that is, *Courts Martial*; and

3. The Courts of Admiralty.

- 3<sup>d</sup>. The restraints in the employment of the Civil and Canon Laws; W. C.

1<sup>o</sup>. The Courts of Common Law superintend and control the Courts which use the Civil and Canon Laws.

2<sup>o</sup>. The Common Law reserves to itself the exposition of all Acts of Parliament which concern those Courts, or their jurisdiction.

3<sup>o</sup>. An appeal lies from these Courts to the Crown, in the last resort.

- 2<sup>a</sup>. The *lex scripta*, or Statute Law.

Let us observe here, (1), How statutes are enacted; (2), The different kinds of statutes; (3), The rule of construction of statutes at common law; and (4), The rules for the construction of statutes prescribed in Virginia;

W. C.

- 1<sup>b</sup>. How Statutes are enacted.

The mode of enacting statutes may be seen from 1 Bl. Com. 181, & seq.; Bac. Abr. Court of Parliament (E.); Id. Statute.

The student is invited to read attentively the passage of Blackstone here cited, from page 181 to 185.

The ordinary mode of passing laws in Congress (and the forms in the State legislatures are very similar) is briefly thus, One day's notice of a motion for leave to bring in a bill, in cases of a general nature, is required; every bill must have three readings before it is passed, and these readings

must be on different days; and no bill can be committed and amended until it has been twice read. In the House of Representatives, bills, after being twice read, are committed to a committee of the whole house, when a chairman is appointed by the speaker to preside over the committee; the speaker leaves the chair and occupies the place of an ordinary member. When a bill has passed one house it is transmitted to the other, and goes through a similar form, though in the Senate there is less formality, and bills are often committed to a select committee chosen by ballot. If a bill be altered or amended in the house to which it is transmitted, it is then returned to the house in which it originated; and if the two houses cannot agree, they appoint each a committee to confer on the subject. When a bill is engrossed, and has received the sanction of both houses, it is sent to the President for his approval. If he approves the bill, he signs it. If he does not, he returns it within ten days (Sundays excepted), with his objections, to that house in which it originated, which enters the objections at large on its journal, and proceeds to reconsider it. If then two-thirds of that house agree to the bill, it is sent, with the objections, to the other house, and if approved by two-thirds of that house, it becomes a law. (Bac. Abr. Statute; Const. U. S. Art. I, § 7.)

2<sup>b</sup>. The different kinds of Statutes; W. C.

1<sup>c</sup>. The different kinds of Statutes, in respect to Subject Matter; Wherein of

1<sup>d</sup>. Public Statutes.

Such as regard, or affect materially, the whole or a great part of the community, which must be noticed by the courts *ex officio*, without being *proved*. (1 St. Ev. 231; Bac. Abr. Stat. (F.); Pot. Dwar. Stat 52, & seq.)

2<sup>d</sup>. Private Statutes.

Being such as concern only a particular species, thing or person, of which the judges will not take notice *ex officio*. (1 Bl Com. 86, and n (21); Pot. Dwar. Stat. 52, & seq.); W. C.

1<sup>e</sup>. Doctrine at Common Law, as to private Statutes.

Must be both *pleaded and proved*. Such statutes in England are frequently used. (Pot. Dwar. Stats. 53, and n (1).)

2<sup>e</sup>. Doctrine by Statute, in Virginia, as to private acts; W. C.

1<sup>f</sup>. Pleading and proof of private acts.

Need not be *pleaded specially*, but must be *proved*. (V. C. 1873, ch. 172, § 1; Legrand v. H. Sidney Coll., 5 Munf. 324; Somerville v. Wimbish, 7 Grat. 225.)

2<sup>f</sup>. Mode of Proof of private Statutes; W. C.

1<sup>g</sup>. By means of a copy certified by the officer charged with the custody of the original Rolls of the Legislature.

In Virginia, that officer is the *Clerk of the House of Delegates*. (V. C. 1873, ch. 14, § 14.)

2<sup>s</sup>. By means of an *Examined copy*,

Which a competent witness proves to have been compared with the original, and found accurate. (1 St. Ev. 232; Pot. Dwar. Stat. 57.)

3<sup>s</sup>. By means of a copy published by the public printer. V. C. 1873, ch. 15, § 8; Pot. Dwar. Stats. 60.

~~are~~ Copies of Acts of Congress, published *by authority*, are admitted in evidence in our courts, (Taylor's Adm'r v. Bank of Alexandria, 5 Leigh, 471), and so Legislative Acts of the sister-States have sometimes been permitted to be so proved, (Thompson v. Musser, 1 Dall. 462; Biddis v. James, 6 Binn. 321; Cox v. Robinson, 2 Stew. & Port. 91; Raynham v. Canton, 3 Pick. 293), but it is safer to comply with the Act of Congress, (passed pursuant to Const. U. S. Art. IV, § 1), and have them authenticated under the *great seal of the State*, (1 Bright. Dig. 265), which proves itself, *no matter by whom affixed*. (U. S. v. Amedy, 11 Wheat. 392; Craig v. Brown, 1 Pet. 352; Leland v. Wilkinson, 6 Pet. 317; Warner's Case 2 Va. Cas. 95; Hunter v. Fulcher, 5 Rand. 126.)

2<sup>c</sup>. The different Kinds of Statutes, in respect to their nature and object;

1 Bl. Com. 86 & seq;  
W. C.

1<sup>d</sup>. Declaratory Statutes.

Confirming and setting forth the old common law, when it has fallen into disuse, or become disputable. (1 Bl. Com. 86; Pot. Dwar. Stats. 55-'6.)

2<sup>d</sup>. Remedial Statutes.

To supply defects, or abridge superfluities of the common law, arising out of the imperfections of human institutions, or out of a change of circumstances and times. (1 Bl. Com. 86; Pot. Dwar. Stats. 58.)

W. C.

1<sup>o</sup>. Enlarging Statutes.

Enlarging the common law where too narrow and circumscribed. (1 Bl. Com. 86-'7.)

2<sup>o</sup>. Restraining Statutes.

Limiting and restraining the common law, where too lax, and luxuriant. (1 Bl. Com. 87.)

3<sup>b</sup>. The Rules to be observed with regard to the construction of Statutes, as prescribed by the Common law;

(Bac. Abr. Statute (I); Potter's Dwar. on Stats. 184 & seq; Fox v. Com'th, 16 Grat. 9 & seq.);

W. C.



1<sup>c</sup>. Advert to the three points of the *Old law*, the *mischief* and the *remedy*, and let the construction tend to suppress the mischief, and advance the remedy.

1 Bl. Com. 87.

2<sup>c</sup>. A Statute which treats of things or persons of *inferior rank*, cannot, by *general words*, be extended to those of a *superior*.

1 Bl. Com. 88.

3<sup>c</sup>. Penal Statutes must be construed strictly, but not so as to defeat the clear intention.

1 Bl. Com. 88; Bac Abr. Stat. (I), 9.)

4<sup>c</sup>. Remedial Statutes (*e. g.*, statutes aimed against frauds) are to be construed liberally.

So far as a statute annuls a fraudulent or illegal transaction, it is *remedial*, and to be *liberally expounded*. So far as it acts upon the offender, by inflicting a penalty, it is *penal*, and to be *construed rigorously*. (1 Bl. Com. 88-'9; Bac. Abr. Stat. (I), 8.)

All laws for suppressing gaming, lotteries, &c., shall be construed as *remedial*. (V. C. 1873, ch. 194, § 24; Shumate's Case, 5 Grat. 653.)

5<sup>c</sup>. One part of a Statute must be construed by another, *ut res magis valeat, quam pereat*.

1 Bl. Com. 89; Bac. Abr. Stat. (I), 2, 3.

6<sup>c</sup>. A saving *totally* repugnant to the body of the Act is void. But they must be reconciled if possible.

1 Bl. Com. 89.

7<sup>c</sup>. Where the Common law and a statute differ, the Common law gives place to the statute; and an old statute gives place to a new one. (1 Bl. Com. 89.)

But they must be reconciled if possible, as if there be no *negative words* in the last law, they often may be. (Id. 90; Yerger's Case, 8 Wal. 105.)

So, under the limited written constitutions of America, a statute totally repugnant to the constitution gives place to the constitution. (Case of the Judges, 4 Call. 141 (the *second case* upon that point in America, decided 1788, the first being in Rhode Island, decided in 1786); Kemper v. Hawkins, 1 Va. Cas. 20; Jackson v. Rose, 2 Va. Cas. 34; Hunter v. Martin, 4 Munf. 1; Crenshaw v. Slate Riv. Co., 6 Rand. 245; Goddin v. Crump. 8 Leigh, 120; Clopton's Case, 9 Leigh, 109; Harrison Justices v. Holland, 3 Grat. 247; Sharpe v. Robertson, 5 Grat. 518; Fletcher v. Peck, 6 Cranch, 87; Gibbons v. Ogden, 9 Wheat, 1; McCulloch v. Maryland, 4 Wheat, 316; Garland's Case, 4 Wal. 333; Cummings v. Missouri, 4 Wal. 277; Legal Tender Cases, 12 Wal. 457; Gunn v. Barry, 15 Wal. 610; Antoni v. Wright, 22 Grat. 833; Homestead Cases, Id. 266; Federalist, No. LXXVIII; Pot. Dwar. Stats. 362'-3, & seq.; 3 Brough, Pol. Phil. 338.)

8<sup>c</sup>. If a Statute which repeals another is itself afterwards repealed, the first is thereby revived.

1 Bl. Com. 90.

It is otherwise in Virginia, unless the latter repealing law be passed *during the same session*. (V. C. 1873, ch. 15, § 14.)

But if the common law be repealed by a statute, which is itself afterwards repealed, the common law is thereby revived. (Insur. Co. of the Valley v. Bailey's Adm'r, 16 Grat. 384; Booth's Case, Id. 529.)

9<sup>c</sup>. Acts derogatory from the power of subsequent Legislatures are of no force.

1 Bl. Com. 90.

10<sup>c</sup>. Statutes that are impossible to be performed are of no validity.

Hence consequences and constructions, contradictory to common reason and justice, are to be avoided as not within the legislative intent. (Bonham's Case, 8 Co. 118, a; 1 Bl. Com. 91.) But if the *words are clear*, there seems in England (where no limitation to the power of parliament exists) no power in the courts to defeat the intent. (1 Bl. Com. 91; Pot. Dwar. Stat. 76, & seq.)

*Aliter* in America, under our written, limited constitutions. *Supra*, 7<sup>c</sup>. See Loan Association v. Topeka, 20 Wal. 662, & seq.

11<sup>c</sup>. In general revisals of Codes, it is the established rule of construction that the old law is not intended to be altered, unless such intention plainly appears in the new Code.

(Taylor v. Delancey, 2 Ca. Cas. 143; Parramore v. Taylor, 11 Grat. 242-'3; Steamb't Wenonah v. Bragdon, 21 Grat. 695.)

4<sup>b</sup>. Rules to be observed, with regard to the construction of Statutes, as prescribed by law in Virginia, in order to diminish verbiage in their enactment.

V. C. 1873, ch. 15, § 9.

W. C.

1<sup>c</sup>. The word "State," applied to a part of the United States, shall include the District of Columbia and the several Territories, and so also shall the words "United States."

*Contra*, independently of statute. (Hepburn & Dundas v. Ellzey, 2 Cr. 342.)

2<sup>c</sup>. The words "the governor" shall be equivalent to "the executive power of this Commonwealth," or to "the person having the executive power." The word "justice," or "justices," shall be construed as if the words "of the peace" followed them.

3<sup>c</sup>. Words purporting to give authority to three or more shall be construed to give it to a majority, unless otherwise expressed.

- 4<sup>c</sup>. The words "personal representative" shall include an executor, an administrator, an administrator with a will annexed, an administrator *de bonis non*, with or without a will annexed, a sheriff, &c., committee, and every other curator or committee of a decedent's estate, for or against whom suits may be brought for causes of action accrued to or against the decedent.
- 5<sup>c</sup>. The words "insane person" shall include every one who is idiot, lunatic, non compos, or deranged.
- 6<sup>c</sup>. The word "oath" shall include an affirmation in all cases where an affirmation may be substituted for an oath; and in like cases the word "sworn" shall include the word "affirm."
- 7<sup>c</sup>. Unless otherwise expressed, the word "month" shall mean a *calendar* month, and the word "year" a *calendar* year. And the word "year" alone shall be equivalent to "year of our Lord."
- Accordant*, independently of Statute, *Brewer v. Harris*, 5 Grat. 285; *Vandewall's Case*, 2 Va. Cas. 275; *Sheets v. Selden's Lessee*, 2 Wal. 189-'90.
- 8<sup>c</sup>. Where a Statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time exclusive of the day for such motion or proceeding, but the day on which such notice is given, or such act is done, may be counted as part of the time.
- This doctrine prevails independently of statute. (*Sheets v. Selden's Lessee*, 2 Wal. 190.)
- 9<sup>c</sup>. Where a Court or other proceeding is directed to take place on a particular *day of the month*, if that is Sunday, it shall take place the *next day*. And where a court or proceedings are to be adjourned *from day to day*, an adjournment from Saturday to Monday is legal.
- 10<sup>c</sup>. The word "land" or "lands," and the words "real estate," shall include lands, tenements, and hereditaments, and all rights thereto and interests therein, other than a chattel-interest; and the words "personal estate" shall include chattels real, and such other estate as upon the death of the owner intestate, would devolve upon his personal representative.
- 11<sup>c</sup>. The words "written" or "in writing" shall include any representation of words, letters or figures, whether by printing or otherwise.
- 12<sup>c</sup>. The word "seal," in respect of *any court or public office*, shall include an impression of such official seal made upon the *paper alone*, as well as an impression made by means of a wafer, or of wax affixed thereto. And in respect to a

natural person, the word "seal" shall include a *scroll affixed by way of seal*.

13<sup>c</sup>. Singular words may extend to several persons or things, and *vice versa*; words *masculine* may extend to *females*; and the word "person" may be applied to bodies politic and corporate, as well as to individuals.

14<sup>c</sup>. The words "preceding" and "following," referring to sections of statutes, shall mean *next preceding* and *next following*.

15<sup>c</sup>. The construction and effect of certain words, descriptive of *subjects of taxation* in the laws for the assessment and collection of taxes.

V. C. 1873, ch. 15, § 10 to 12.

16<sup>c</sup>. Effect of a law repealing a former law.

A new law shall not be construed to repeal a former law, as to any offence committed against the former, nor as to any act done, or penalty incurred, or any right accrued or claim arising under the former law, or in any way to affect any such offence, act, penalty, right or claim, arising before the new law takes effect; save only that the proceedings thereafter had shall conform, as far as practicable, to the laws in force at the time of such proceedings; and if any penalty, &c. be *mitigated* by the new law, the provision, with the consent of the party affected, may be applied to any judgment subsequently pronounced. (1 V. C. 1873, ch. 15, § 13; *Campbell's Adm'r v. Montgomery*, 1 Rob. 392; *Phillips' case*, 19 Grat. 485; *Crawford v. Halstead & al.*, 20 Grat. 220 & seq.)

3<sup>a</sup>. The Law prevailing in Virginia; W. C.

1<sup>b</sup>. The law in Virginia previous to the Revolution of 1776; W. C.

1<sup>c</sup>. The common law of England, *except particular customs*. (*Harris v. Carson*, 7 Leigh, 632; *Mason v. Moyers*, 2 Rob. 606.)

A pernicious and unwarrantable doctrine has been propounded, as we have seen (1 Kent's Com. 473), that English statutes passed *before the emigration* of our ancestors, and applicable to our situation, and in amendment of the common law, constitute a part of the *common law of this country*. Others would embrace in the *common law* of these States all English statutes in aid of the common law *before the Revolution*. (1 Abb. U. S. Pr. 195). See *Contra*, *Levy v. McCartee*, 6 Pet. 110, as to the general doctrines. And in Virginia, it is pointedly negatived by the ordinance of May, 1776, which adopts as the law of the Commonwealth, until altered by the legislature, "the common law of England, all statutes or acts of parliament made in aid of the common law, prior to 4 Jac.

I, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly now in force," &c. (9 Hen. Stat. 127.)

- 2°. The general Statutes of England, made in aid of the common law, and not local to England, prior to 4 Jac. I.

That being the date of the first charter of Virginia, the Virginian community was thereby severed from that of England; but they brought hither with them all the *general laws* of the mother country, but no *particular customs*. (1 Bl. Com. 107; 1 Steph. Com. 98.)

- 3°. The Statutes of England after 4 Jac. I, which specially named Virginia, or the colonies generally.

1 Bl. Com. 108.

- 4°. Acts passed by the Colonial Assembly.

Hen. Stats. at Large, vols. 1 to 9.

- 2°. The law in Virginia since the Revolution; W. C.

- 1°. The laws enacted by direct authority of the Commonwealth; W. C.

- 1°. The Common law of England, so far as not repugnant to the Constitution, nor altered by the general assembly.

Ordinance of Convention of 1776, 9 Hen. Stats. 127; 13 Hen. Stats. 23; V. C. 1873, ch. 15, § 1; Findlay v. Smith & ux, 6 Munf. 148; Coleman v. Moody, 4 Hen. & Munf. 19.

- 2°. Remedial and Judicial writs, given by any act of parliament, made in aid of the common law, prior to the 4th year of James I, of a general nature, not local to England.

V. C. 1873, ch. 15, § 2.

- 3°. Acts of Assembly, and State Constitution and Bill of Rights.

- 2°. The laws of the United States.

The Constitution of the United States, and the laws and treaties made in pursuance thereof, are the *supreme law* of the land, anything in the constitution or laws of any State to the contrary notwithstanding. (U. S. Const. Art. VI, § 2.)

W. C.

- 1°. Constitution of United States.

- 2°. Acts of Congress made in pursuance of the Constitution.

- 3°. Treaties made under the authority of the United States.

## SECTION IV.

## OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

## IV. The Countries subject to the Laws of England.

1 Bl. Com. 92 to 120; W. C.

1<sup>a</sup>. The various countries *subject to the authority* of England;  
W. C.

1<sup>b</sup>. England and Wales.

These, since 27 Hen. VIII, c. 26, have had an entire *communion of laws*, but they had a *diversity of courts* until 11 Geo. IV, and 1 Wm. IV, c. 70 (A. D. 1830), since which the Welsh judicature is entirely incorporated with that of England. (1 Bl. Com. 94—'5; 3 Steph. Com. 455, n (f).)

2<sup>b</sup>. Scotland.

Upon the accession of James VI of Scotland to the English throne (as James I of England), A. D. 1602, there was an union of *crowns*, but they continued distinct kingdoms until 6 Anne (A. D. 1707), when they were united into one by agreement of the parliaments of both nations. But the municipal laws of Scotland still prevail there unless altered by parliament, whose acts always extend to Scotland, unless it be *expressly excepted*. (1 Bl. Com. 95 to 98. 1 Steph. Com. 87.)

3<sup>b</sup>. Ireland.

Upon the conquest of Ireland by Henry II (A. D. 1171—'2), the laws of England, including the common law, were imposed, and their observance enforced (against the *Brehon* law, to which the people were attached), in 12 John (A. D. 1211); in 30 Henry III (A. D. 1246); in 5 Edw. I (A. D. 1277); and finally, in 40 Edw. III (A. D. 1367). No statute of England, since 12 John, was in force in Ireland, unless *expressly named* (Ireland having a parliament of its own), until it was incorporated as an integral part of the British dominions (A. D. 1807), by 39 and 40 Geo. III, c. 67. Since the union all acts of parliament extend to Ireland, unless it be *expressly excepted*. (1 Bl. Com. 99 to 104; 1 Steph. Com. 88 to 95.)

4<sup>b</sup>. Berwick upon Tweed,

Berwick was originally part of the kingdom of Scotland, from which it was conquered (A. D. 1296,) by Edward I, who granted it a charter, and the town being afterwards ceded by Edward Baliol, (A. D. 1333), to Edward III, the latter granted further charters, (A. D. 1337 and 1357), whereby he confirmed its privileges, and especially provided that it should be governed by its ancient *Scottish laws*. Its present Constitution is by Statute 2 Jac. I, c. 28, (A. D. 1605), which confirms and enlarges its privileges, making it

a county of itself, that is a county of a town corporate. It is bound, however, by all Acts of Parliament *whether named or not*. (1 Bl. Com. 99; 1 Steph. Com. 87-'8; Rex v. Cowles, 2 Burr. 850 & seq.)

5<sup>b</sup>. The Isle of Man.

The Isle of Man is a distinct territory from England, and not governed by its laws, nor bound by any Act of Parliament unless specially named. It was formerly a subordinate feudatory kingdom, subject to the Kings of Norway, and at length, through various transfers, granted by Henry VII, (A. D. 1492), to Sir John Stanley, and after sundry grants and forfeitures, it was conferred in 7 James I, (A. D. 1610), on William Earl of Derby, from whose family it passed (A. D. 1735), to the Duke of Atholl, and was finally purchased by the Crown, in 5 Geo. III, (A. D. 1765), and thereby its *jura regalia* were extinguished. (1 Bl. Com. 105-'6; 1 Steph. Com. 96-'7.)

6<sup>b</sup>. Islands of Jersey, Guernsey, Sark, Alderney, &c., in the British Channel.

These islands were parcel of the Duchy of Normandy, and were united to the Crown of England by the first princes of the Norman line. They are governed by their own laws, collected in an ancient book entitled "*Le Grand Coustumier*," and are not bound by Acts of Parliament, *unless specially named*. An appeal lies from their courts to the King in council. (1 Bl. Com. 106; 1 Steph. Com. 97; Hale Hist. Com. Law, 147 (ch. vi): Id. 266, (ch. ix).)

7<sup>b</sup>. Isles of Wight, Portland, Thanet, &c.

These islands are comprised within some neighboring county, and are to all intents and purposes *parts of the realm of England*. (1 Bl. Com. 105; 1 Steph. Com. 95.)

8<sup>b</sup>. Plantations and Colonies.

The plantations and colonies of England are not subject to Acts of Parliament, *unless particularly named*. (1 Bl. Com. 108; 1 Steph. Com. 99, 100.)

W. C.

1<sup>c</sup>. Different kinds of Plantations or Colonies in respect to the mode of acquisition; W. C.

1<sup>d</sup>. Plantations or Colonies settled by English subjects.

The settlers carry with them the general laws of England, *e. g.*, of Inheritance, Marriage, Contracts, Personal Rights, &c., but not the constitutions of a more artificial character, *e. g.*, laws of police, revenue, maintenance of religion, &c., nor *local customs*. (1 Bl. 107; 1 Steph. Com. 98.)

2<sup>d</sup>. Colonies wrested by conquest or treaty from other powers.

They retain their own laws, until changed by the



sovereign in council, or by parliament, or by such legislature as he or it shall provide; a principle applicable universally in modern times to newly acquired territory. (1 Bl. Com. 107; 1 Steph. Com. 99; *United States v. Percheman*, 7 Pet. 87.)

2<sup>c</sup>. Different kinds of Colonies and Plantations, in respect of interior polity.

They are all modelled after the Government of England. (1 Bl. Com. 108 to 110; 1 Steph. Com. 101.)

W. C.

1<sup>d</sup>. Provincial Governments.

Constituted by Royal Commission, or by Act of Parliament, with a governor appointed by the crown, and a Legislature usually consisting of a council appointed by Royal authority, and a House of Representatives elected by the people, with power to make laws not repugnant to those of England, subject to a *Veto-power* possessed by the governor; *e. g.*, Virginia, from 1624 to 1776. (1 Bl. Com. 108; 1 Steph. Com. 101.)

2<sup>d</sup>. Proprietary Governments.

Created by grants made by the crown, to individuals, in the nature of feudatory principalities, with subordinate powers of legislation, (commonly exercised as *supra* 1<sup>d</sup>), but subject to the sovereignty of the mother-country; *e. g.*, Maryland, prior to 1776. (1 Bl. Com. 108.)

3<sup>d</sup>. Charter Governments.

In the nature of civil corporations, created by Royal charter, with power to make laws for their interior regulation, not contrary to the laws of England, and with such rights and authority as the charter confers. They commonly organize a government after the model of England; *e. g.*, Virginia until 1624, Massachusetts, &c. (1 Bl. Com. 109; 1 Steph. Com. 101-'2.)

9<sup>b</sup>. Foreign Dominions, belonging to the *person* of the King; *e. g.*, Hanover formerly; none at present. Hanover was wholly unconnected with the laws of England, and in no wise under the control of the English Parliament; and since the accession of Queen Victoria, in consequence of the *Salique* law, (excluding females,) it has had a different sovereign. (1 Bl. Com. 110; 1 Steph. Com. 106-'7; *Bouv. Law Dict. v. Salique.*)

10<sup>b</sup>. Possessions in the East Indies.

These arose out of the acquisitions of the "East India Company," which was constituted, for *trading purposes alone*, by 6 Anne c. 17, (A. D. 1708,) out of two commercial corporations previously existing. After many mutations tending all in that direction, [*viz.* by Stat. 13 Geo. III, c. 63, (A. D. 1773;) 24 Geo. III, c. 25, and 26 Geo. III, c. 16, (A. D.



784, 1786;) 53 Geo. III, c. 155, (A. D. 1813;) and 3 & 4 Wm. IV, c. 85, (A. D. 1834,)] the local government of India was committed to a Governor-general, and a board of councillors, with power to make laws for all persons, British or native, throughout the territories, subject to the allowance of the Board of Directors in London, and subject also to the paramount authority of Parliament. (1 Steph. Com. 104 to 106;) and at length, in consequence of the Indian revolt of 1857-'8, it was, in 1858, enacted by 21 and 22 Vict. c. 106, that all territories in the possession or under the government of the East India Company, and all rights vested in the said Company in relation thereto, should become vested in Her Majesty, and be exercised in her name, through the agency of a Secretary of State. (Broom & Hadl. Com. 14.)

The Territory immediately subject to the Laws of England.

W. C.

The High Seas, beginning at low-water mark.

These are subject to the jurisdiction of the Admiralty Courts, and not to that of the courts of common law. Between high and low-water, where the sea ebbs and flows, the common law and the Admiralty have *divisum imperium*, an alternate jurisdiction. (1 Bl. Com. 110; 1 Steph. Com. 108.)

England, Wales, and Berwick.

The territory immediately subject to the laws of England, including England, Wales, and Berwick, is composed of, (1), Ecclesiastical divisions; and (2), Civil divisions;

W. C.

1. Ecclesiastical Divisions of the Territory of England, &c.

1 Bl. Com. 111 to 113; 1 Steph. Pl. 108 to 114;

W. C.

2. Provinces of Canterbury and York,—presided over each by an Arch-bishop.

The Arch-bishop of Canterbury is called the *Primate of all England*.

3. Dioceses,—each presided over by a Bishop.

Twenty dioceses in the province of Canterbury, and six in that of York.

4. Arch-Deaconries,—each presided over by an Arch-deacon. Arch-deaconries are sub-divisions of dioceses.

5. Rural Deaneries,—each presided over formerly by a Rural Dean.

Rural Deaneries are sub-divisions of Arch-deaconries.

6. Parishes.

Parishes are sub-divisions of Rural-Deaneries. They are the circuits of ground committed to one parson, vicar, or other minister.

## 2°. Civil Divisions of the Territory of England, &amp;c.

1 Bl. Com. 114 to 120 ; 1 Steph. Pl. 114 to 124. Their formation, or at least their organization, is ascribed to Alfred. They consist of, (1), Tithings, towns, vills or boroughs ; (2), Of hundreds ; (3), Of lathes, rapes, and trithings, or ridings ; and (4), Of counties ;  
W. C.

1<sup>d</sup>. Tithings, Towns, Vills, Boroughs.

These terms appear to have about the same meaning. The name *Tithing*, is Saxon, and is so called because *ten* freeholders, with their families, compose one, each freeholder being surety for the rest. The head-man was called *Tithing-man* or *Borsholder* (*Borough's-ealder*) ; and originally each such division had a church, thus corresponding somewhat to *parishes*. (1 Bl. Com. 114-'15 ; 1 Steph. Com. 114 to 116) ;  
W. C.

## 1°. Cities.

Large towns which are or have been the seat of a *Bishop's See*. They usually possess the apparatus of municipal government, with peculiar privileges, quite separate from the county in which they are situated.

## 2°. Boroughs.

Cities, or other towns which send *Burgesses to Parliament*.

## 3°. Towns.

In modern times, collections of dwellings, with or without corporate privileges, or municipal government.

2<sup>d</sup>. Hundreds.

Composed of *ten Tithings*, whose chief officer is a high constable, or bailiff, and formerly provided with a Hundred-court for the trial of causes. In the northern counties, Hundreds are called *Wapen-takes*. The division seems to have been borrowed from Denmark, and to have been derived originally from the Germans. (1 Bl. Com. 115 ; 1 Steph. Com. 117.)

3<sup>d</sup>. Lathes (in Kent), Rapes (in Sussex), and Trithings or *Ridings* (in Yorkshire).

Intermediate divisions between Tithings and Counties, prevailing in a few counties. (1 Bl. Com. 116 ; 1 Steph. Com. 118.)

4<sup>d</sup>. Counties or Shires

Counties, from French *Count* (Comes), or Earl, the chief executive officer, the Sheriff (*vice-comes*), being his deputy ; *Shires*, from Saxon *Scir-an*, to divide, whence the acting executive was styled *Scire-gerefa*, shire-reeve, or Sheriff—i. e., Steward of the Shire.

The division was originally intended for the convenient

dispatch of *judicial business*, in local courts held before the sheriff, in conjunction, for a time, with the bishop. In modern times a similar use is made of the division, but the courts are held by judges of the courts at Westminster, who make periodical circuits for the purpose, or by county-justices in certain criminal and police cases, at *Quarter Sessions*, &c.

The division also subserves the ends of the *allotment of representation* in parliament, and of *taxation for local purposes*;

W. C.

1°. Counties ordinary.

Under which are ranged at present almost all, if not every one, of the counties of England and Wales.

2°. Counties Palatine—Chester, Durham, and Lancaster.

Called so a *palatio*, because the owners or chiefs thereof had *jura regalia*, the Earl of Chester and the Bishop of Durham, probably because they bordered upon the inimical countries of Wales and Scotland (on which account also there were formerly two other counties-palatine—Pembrokeshire and Hexhamshire), and the Duke of Lancaster, perhaps because he was of the blood-royal. But none of these counties-palatine now remain in the hands of a subject, Chester having been united to the Crown by Henry III, Durham by Stat. 6 and 7 Wm. IV, c. 19 (A. D. 1837), and Lancaster by Stat. 1 Henry VII (A. D. 1485). (1 Bl. Com. 117 to 119; 1 Steph. Com. 120 to 123.)

3°. Isle of Ely.

Never a county-palatine (though sometimes erroneously so called), but formerly a royal franchise, with *jura regalia*, vested in the Bishop of Ely, which, however, were transferred to the Crown by Stat. 6 and 7 Wm. IV, c. 87. (1 Bl. Com. 119; 1 Steph. Com. 123.)

4°. Counties corporate.

Which are certain cities and towns, to which has been granted by the Crown the privilege of being governed by their own officers, and not by those of the county in which they are situated; *e. g.*, London, York, Bristol, &c. (1 Bl. Com. 120; 1 Steph. Com. 123-'4.)

# THE OBJECTS

OF

## THE COMMON AND STATUTE LAW.

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### BOOK THE FIRST.

#### OF THE RIGHTS WHICH RELATE TO THE PERSON.

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THE objects of the common and statute law, as may be gathered from the definition of municipal law, and its analysis, (*ante* p. 22, 1<sup>d</sup>), are to *define and secure rights, and to redress wrongs*, so that the whole subject, (omitting the consideration of crimes and punishments,) may be classified under the several heads of, I. RIGHTS WHICH CONCERN OR RELATE TO THE PERSON; II. RIGHTS WHICH CONCERN OR RELATE TO THINGS; and III. MODES OF SECURING RIGHTS AGAINST INVASION, AND OF OBTAINING REDRESS FOR WRONGS; W. C.

##### I. THE RIGHTS WHICH CONCERN OR RELATE TO THE PERSON.

RIGHTS are correlative to DUTIES. They are said to be *perfect* when their existence in no wise depends on the judgment of another, *e. g.*, in case of a *debt*; and *imperfect* when their existence depends on circumstances to be determined by the discretion of the party who is alleged to owe them, *e. g.*, in case of *charity*. A *perfect* right may be enforced; an *imperfect* one cannot be.

We are to discuss, (1), The rights which concern or relate to the person, in respect to natural persons; and (2), In respect to artificial persons, or corporations;

W. C.

##### 1<sup>a</sup>. Rights which concern or relate to the Person, in respect to Natural Persons.

Rights of this character are either (1), Absolute rights; or (2), Relative rights;

W. C.

## CHAPTER I.

## OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

1<sup>b</sup>. The Absolute Rights, which relate to the Person, in respect to Natural Persons.

Absolute rights are such rights as are independent of the relations of men in society, and which belong to every one alike. They constitute the *liberties of the citizen*. (1 Bl. Com. 123 & seq.) We may discuss the subject under the heads of, (1), The nature of liberty; (2), The several sorts of absolute rights; and (3), The solemn declarations and guards of absolute rights;

W. C.

1<sup>c</sup>. The Nature of Liberty; W. C.1<sup>d</sup>. Natural Liberty.

The right of disposing of Person and Property at pleasure, so it be not to the prejudice of another. (1 Bl. Com. 126, n (5); 2 Burlamaq. Nat. & Polit. Law, Pt. I. c. III, § xv.)

2<sup>d</sup>. Civil Liberty.

Natural liberty so far restrained by human laws (and no farther), as is necessary and expedient for the public advantage. (1 Bl. Com. 125 : Id. 126, n (5).)

3<sup>d</sup>. Political Liberty.

The security with which, from the Constitution and from the established government, the subjects enjoy civil liberty. (1 Bl. Com. 126, n (5).)

2<sup>c</sup>. The Several Sorts of Absolute Rights.

The several sorts of absolute rights include, (1), The right of personal security; (2), The right of personal liberty; (3), The right of personal property; and (4), The right of freedom of science;

W. C.

1<sup>d</sup>. The Rights of Personal Security.

1 Bl. Com. 129 & seq; 3 Bl. Com. 120, &c.; Synops. Crim. Law, 37 & seq.

W. C.

1<sup>o</sup>. Security of Life.

Security of life is guarded even in the womb, it being a *felony* to bring about abortion; and if the child be born alive and die by reason of the injury, it is *murder*. (Synops. Crim. Law, 55; 1 Bl. Com. 129, 130, & n (11).) An unborn child, though illegitimate, may take property, if sufficiently described, (*e. g.*, as the child of *such a woman*). (1 Bl. Com. 130, n (13); 2 Lom. Ex'ors, 35.)

2<sup>o</sup>. Security of Limbs, *useful in fight*, for defence or annoyance.

1 Bl. Com. 130 & seq; 3 Bl. Com. 121.

W. C.

1<sup>f</sup>. The wilful Disabling of Limbs.

The wilful disabling of limbs useful in fight, constitutes the crime of *mayhem* at common law. (1 Bl. Com. 130; Synops. Crim. Law, 67; 4 Bl. Com. 205.)

2<sup>f</sup>. Defence of Limbs.

The necessary defence of one's limbs will excuse even homicide.

(1 Bl. Com. 130.)

3<sup>f</sup>. Duress *per minas*.

The most solemn acts and agreements are invalidated, if extorted by a *well-grounded* apprehension of the loss or disabling of limbs. (1 Bl. Com. 130-'31.)

4<sup>f</sup>. Support for Life and Member, provided for the Poor.

1 Bl. Com. 131.

5<sup>f</sup>. Continuance of Rights of Life and Member, determined only by Death.

The common law acknowledges two sorts of death, namely, (1), Civil death; and (2), Natural death.

W. C.

1<sup>s</sup>. Civil Death.

Civil death is the state of a person who, though possessing natural life, has lost all his civil rights, and as to them is considered as dead. (1 Bl. Com. 132;)

W. C.

1<sup>h</sup>. Modes of Civil Death at Common Law; W. C.

1<sup>i</sup>. Attainder of treason or felony.

1 Steph. Com. 132; 4 Bl. Com. 380.

2<sup>i</sup>. Banishment from, or Abjuration of the Realm.

1 Bl. Com. 132; Id. 133, n. (15); Bac. Abr. Bar. & F. (M).

3<sup>i</sup>. Entering into Religion, *i. e.*, becoming a monk professed.

Even in the times of popery in England, the law of England took no cognizance of monkish profession in any foreign country, and, therefore, this disability is held to be abolished since the reformation. (1 Bl. Com. 132; Rex v. Lady Portington, 1 Salk. 162.)

2<sup>h</sup>. Effect of Civil Death at Common Law.

The party is regarded as actually dead, his will is admitted to probate, or administration granted, &c. (1 Bl. Com. 132.)

3<sup>h</sup>. Existing state of the law in England.

There can be no monkish profession in England since the reformation, (and of foreign profession no notice was ever taken); and abjuration of the realm

as incident to the right of sanctuary, was abolished by Stat. 21 Jac. I, c. 28. (1 Bl. Com. 133; 4 Bl. Com. 333.) It would seem, however, that abjuration might arise in other ways. (4 Bl. Com. 124; Id. 56.) And the books, since 21 Jac. I, seem to recognize it. (Bogget v. Frier & al., 11 East 301; \* 2 Inst. 629.) It seems that banishment operates a civil death. (Bac. Abr. B. & F. (M).)

4<sup>b</sup>. Existing state of the law in Virginia.

Abjuration, banishment and monkish profession are unknown to the law of Virginia, and it is believed that there is no such thing with us as a *Civil Death*. (Branch v. Bowman, 2 Leigh, 170; Platner v. Sherwood, 6 Johns, (N. Y.) 127).

A sentence to the penitentiary does not of *itself*, independently of statute, involve such a consequence. [1 Bl. Com. 133, n. (15); Platner v. Sherwood, 6 John, 127]; but it does lead in Virginia by statutes to a commitment of the convict's estate to a *Committee*, to be managed very much as if he were dead, (V. C. 1873 c. 206, § 6 to 12); and such conviction is also ground of divorce *a vinculo matrimonii*. (V. C. 1873 c. 106, § 6.)

If one once a resident of Virginia is absent therefrom for seven years successively, he is *presumed to be dead*, unless proved to have been alive within that time. (V. C. 1873 c. 170, § 47; Bac. Abr. Dower, &c., (C), 3; 1 Greenl. Evid. § 41.)

2<sup>a</sup>. Natural Death; W. C.

1<sup>a</sup>. Value set upon Life, as the gift of the Creator.

Life is not to be destroyed by the person himself, or by any other, merely upon their own authority, but it may be forfeited for the breach of the laws of society, in *very grave* cases, for the preservation of society. (1 Bl. Com. 133-4; Do. 11, 12, 14; Grot. de Jure, &c., B. II, c. 20, § 12, 2.)

2<sup>b</sup>. Protection to Life afforded by *Magna Charta*;

*Magna Charta* condemns and forbids the arbitrary killing or maiming the subject, without express warrant of law. "*Nullus liber homo aliquo modo destruat, nisi per legale iudicium parium suorum aut per legem terræ.*" (1 Bl. Com. 133; 1 Rap. Eng. 290, B. viii.)

3<sup>a</sup>. Security of Body.

In respect to menaces, assaults, beating and wounding.

NOTE.—It was recognized in Bogget v. Frier & al., merely by a plea averring that the plaintiff was a married woman, whose husband was a native-born citizen, and that she had not abjured the realm, &c., and yet that plaintiff was suing alone as a feme sole. A demurrer to the plea was overruled, but no stress was laid on the abjuration.

The same propositions are in the main true, as in respect of security of limbs. (1 Bl. Com. 134; 3 Bl. Com. 120, &c.)

4°. Security of Health.

In respect of practices which may annoy or injure it. (1 Bl. Com. 134; Synops. of Crim. Law, 178, &c.; 3 Bl. Com. 122.)

5°. Security of Reputation.

In respect of acts of detraction or slander. (1 Bl. Com. 134; Synops. of Crim. Law, 161, & seq.; 3 Bl. Com. 123 & seq.)

2<sup>d</sup>. The Right of Personal Liberty.

In discussing the right of personal liberty it is proposed to advert (1), To the prohibition by the Great Charter of imprisonment, unwarranted by law; (2), The great importance of protecting the personal liberty of the subject; (3), The securities provided against the violation of personal liberty; (4), What confinement amounts to imprisonment; (5), Duress of imprisonment; (6), Requirements as to warrants of commitment; and (7), Involuntary exile. (1 Bl. Com. 134; 3 Bl. Com. 127 & seq.; W. C.

1°. Prohibition by the *Great Charter* of Imprisonment, unwarranted by law.

*"Nullus liber homo capiatur, vel imprisonetur, nisi per legale iudicium parium suorum, vel per legem terræ."* (4 Bl. Com. 349-'50; 1 Rap. Eng. 290, B. viii.)

2°. Great importance of protecting the Personal Liberty of the Subject.

No engine of tyranny is so oppressive as that of irresponsible and capricious imprisonment, nor any so dangerous, because it is less likely to create seasonable alarm amongst the people, as was formerly witnessed in France. (1 Bl. Com. 135-'6.)

3°. Securities provided against the violation of Personal Liberty; W. C.

1<sup>f</sup>. Securities provided in England.

The writ of *Habeas Corpus*—the great citizens' *Writ of Right*, secured by many statutes, but especially by 31 Car. II, enforced by 56 Geo. III, c. 100. (1 Bl. Com. 135; 1 Steph. Com. 135-'6; 3 Bl. Com. 129 & seq.)

By means of this writ, the *lawfulness* of the imprisonment alone is enquired into, not its *justice*. (*Ex-parte Watkins*, 3 Pet. 201. *Ex-parte Kearney*, 7 Wheat, 38.)

2<sup>f</sup>. Securities provided in Virginia.

The securities against the violation of personal liberty, provided in Virginia, relate as well to the Federal as to the State government, so that we may observe,



(1), The constitutional guaranties to preserve the writ of *habeas corpus*; (2), The mode of prosecuting the writ of *habeas corpus* in the Virginia State courts; (3), The mode of prosecuting that writ in the courts of the United States; and (4), The doctrine as to the suspension of the writ of *habeas corpus*.

1<sup>a</sup>. Constitutional guaranties to preserve the writ of *Habeas Corpus*.

The Constitution of the United States (Art. I, § ix, 2), and that of Virginia (Art. V, § 14, Const. 1869), provide as to the two governments respectively, that the "privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

2<sup>a</sup>. The mode of prosecuting the Writ of *Habeas Corpus* in the State Courts of Virginia.

The mode of prosecuting the writ of *habeas corpus* in the State courts of Virginia may best be exhibited by noting, (1), The courts or judges which may by law grant the writ, and the terms on which it is granted; (2), To whom the writ is addressed, and on whom served; (3), Enforcement of prompt obedience; (4), The judgment upon the writ; the effect thereof, and mode of enforcement; (5), Writ of error to judgment; and (6), Instances of the application of a writ of *habeas corpus*.

1<sup>a</sup>. The Courts or Judges which may grant the writ, and the terms on which granted.

By Statute the circuit, corporation, or county courts, or judges thereof in vacation, upon petition, showing by *affidavit*, or other evidence, probable cause to believe that the party is detained *without lawful authority*, shall grant the writ, but may previously require bond with surety, in reasonable penalty, not to escape by the way, and to pay the costs and charges awarded against him. (V. C. 1873, c. 153, § 1, 3.) And by the Constitution, power *might be* (although it has not been,) conferred on the Court of Appeals to grant the writ. (Art. VI, § 2.)

But it must be observed that the State courts have no authority to award a writ of *habeas corpus* so as to obstruct the exercise of the powers of the United States government. The marshal, or other person having a prisoner in custody under the authority of the United States, should make return to such a writ issued by a State court or judge, that the prisoner is held by authority of the United States, without producing his body. (*Ableman v. Booth*, 21 How. 506, 523; *Tarble's Case*, 13 Wal. 397, 406.)

2<sup>h</sup>. To whom the Writ is addressed, and on whom served.

Addressed to and served on the person who detains the party, or has him in immediate custody, and it is made returnable as soon as may be, before the same or some other court or judge. (V. C. 1873, c. 153, § 2, 4.)

3<sup>h</sup>. Enforcement of prompt obedience.

Three days after service of writ, or if the prisoner has to be brought more than twenty miles, one day more for every twenty miles of such further distance is allowed; and a failure within that time to produce him, with a statement of the cause of the detention, before the court or judge, is punished by a forfeiture of \$300 to the petitioner. And the court or judge may proceed as courts are wont to do, to enforce obedience to the writ, to compel the attendance of witnesses, and to punish contempts. (V. C. 1873, c. 153, § 5, 9.)

4<sup>h</sup>. The Judgment, effect thereof, and mode of enforcement.

The court or judge, upon the return, and any other evidence, (including the affidavits of witnesses, taken on reasonable notice), shall either discharge or remand the prisoner, or admit him to bail, as may be proper, and adjudge the costs, including that of transportation, to be paid as shall seem right. The facts, at the instance of either party, shall be recorded, and the record, if the proceeding is in vacation, shall be signed by the judge, and certified to the clerk of the circuit, corporation or county court for the county or corporation in which the judgment is rendered, as part of its records. The judgment is conclusive unless reversed, save in an action for false imprisonment, and is considered and enforced, even though rendered by the judge in vacation, as if it were a judgment of the court amongst whose records it is entered. (V. C. 1873, c. 153, § 6 7, 8, 9, 10.)

5<sup>h</sup>. Writ of Error to Judgment.

A writ of error lies as in any other case; and in the discretion of the governor, or of the president of the court, the court of appeals may be convened specially to consider the case. (V. C. 1873, c. 153, § 11, 12.)

6<sup>h</sup>. Instances of Application of Writ of *Habeas Corpus*,

See *Ex-parte* Pool & als., 2 Va. Cas. 276; *McClintic v. Lockridge*, 11 Leigh, 253; *Armstrong v. Stone & ux.* 9 Grat. 102; *Elvira's Case*, 16 Grat. 561; *Leftwich's Case*, 20 Grat. 716; *Jones' Case*, Id. 848; *U. States v. Cottingham*, 1 Rob. 615; *U. States v. Blakeney*, 3

Grat. 405; U. States v. Lipscomb, 4 Grat. 41; Cooley's Const'al Lim'ns, 339, &c.

3<sup>d</sup>. Mode of prosecuting the writ of *Habeas Corpus* in the Courts of the United States; W. C.

1<sup>h</sup>. The Courts and Judges whence the writ may be obtained.

From any *Court* of the United States but from the Supreme Court, only when in the exercise of its *appellate* jurisdiction. (*In re Metzger*, 5 How. 176; *In re Kaine*, 14 How. 103;), and also from any *Justice* of the Supreme Court, or *Judge* of any Circuit or District Court of the United States. (1 Bright. Dig. 301-'2; 1 U. S. Stats. 81, § 14; 4 U. S. Stats. 634, § 7; 5 U. S. Stats. 539, § 1; 14 U. S. Stats. 385-'6, § 1; 15 U. S. Stats. 44; Rev. Stats. U. S. 143, § 763, & seq.; *Exp. Yerger*, 8 Wal. 97-'8, 105; *McCardle's Case*, 6 Wal. 324-'5; S. C. 7 Wal. 515; *Exp. Lange*, 18 Wal. 166.)

2<sup>h</sup>. Instances of the application of the writ of *Habeas Corpus* in the United States Courts.

See *Ex-parte Bollman*, 4 Cr. 100; *Ex-parte Watkins*, 3 Pet. 193; S. C. 7 Pet. 568; *Ex-parte Metzger*, 5 How. 176; *Ex-parte Kaine*, 14 How. 103; *Ex-parte Dorr*, 3 How. 103; *Ex-parte Randolph*, 2 Brock. 488; *Ableman v. Booth*, 21 How. 506;\* *Ex-parte Milligan*, 4 Wal. 3; *Ex-parte Yerger*, 8 Wal. 97-'8; *Ex-parte Lange*, 166.)

4<sup>th</sup>. Doctrine as to Suspension of the writ of *Habeas Corpus*.

Allowed only when, in cases of rebellion or invasion, the public safety may require it, which, it would seem, is to be judged of *exclusively* by the legislature. (U. S. Const. Art. I, § ix, 2; 2 Stor. Const. § 1342; 1 Tuck. Bl. App'x, 292; Va. Const. 1869, Art. V, § 14.)

4<sup>o</sup>. What confinement amounts to Imprisonment.

The confinement of the person in anywise; *e. g.*, keeping one against his will in a private house, forcibly detaining him in the street, &c. (1 Bl. Com. 136.)

5<sup>o</sup>. Duress of Imprisonment.

Duress of imprisonment avoids the most solemn acts and agreements thereby extorted, if the imprisonment be illegal;\* or if it be illegally perverted. (1 Bl. Com. 136-'7; *Cadaval v. Collins*, 4 Ad. & El. (31 E. C. L.) 858.

6<sup>o</sup>. Requirements as to Warrants of Commitment.

Warrants of commitment to prison should be in

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\* NOTE.—The case of *Ableman v. Booth*, 21 How. 506, demonstrates with great force that a *Habeas Corpus* awarded by a State judge or court has no authority within the limits of the sovereignty assigned by the Constitution to the United States. The marshal, or other person having the prisoner in custody under the authority of the United States, should make a return to such a writ awarded by a State judge or court, making known the authority by which he holds him, but ought not to obey the process (p. 523. S. P. Tarble's Case, 13 Wal. 396, 406, &c.).

writing, under the hand and seal, or at least under the *hand*, of the officer committing, and should name the party, if his name be known, and express the cause of commitment; and if this last be omitted, the jailor is not bound to detain the prisoner. (1 Bl. Com. 137; Synops. Crim. Law, 215.)

7°. Involuntary Exile.

Sending a subject out of the country, without his own consent, is violative of personal liberty, and prohibited by the great charter, even though under the pretext of an honorable office, as that of ambassador; but it is provided for in certain cases of crime by statute in England. (1 Bl. Com. 137, & n (18); 4 Do. 401.)

3<sup>d</sup>. The Right of Private Property.

1 Bl. Com. 138 & seq.

W. C.

1°. The Origin of Property.

The notion of property is founded in the law of Nature, *i. e.*, of God, but is liable to be qualified and restricted, according to the exigences of society, by human law. (1 Bl. Com. 138; Do. 2 & seq; Grot. De Jur. Bell & Pac. B. II, c. I, § II, 4, 5; Puffend. B. IV, § VI; Mackintosh's Essays, 36.)

2°. Protection afforded to the Right of Property by the *Great Charter*.

No freeman shall be disseised or divested of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land. (1 Bl. Com. 138-'9; 1 Rap. Eng. B. VIII, p. 291.)

3°. Private property is not to be taken for public uses without just compensation.

1 Bl. Com. 139, & n (19); U. S. Const. Amendments, Art. V; Va. Const. 1869, Art. V, § 14.)

4°. No Taxes are to be imposed, save by consent of the people, or their representatives.

1 Bl. Com. 140; Va. Const. 1869, Art. I, (Bill of Rights,) § 8; Id. Art. X, § 10, 11, 1.

4<sup>d</sup>. The Right of Freedom of Conscience.

The idea of *toleration* of diversities of religious belief, but with a marked preference accorded by law to a certain form of faith, had, for a hundred years prior to our revolution, been familiar to the English mind in the mother-country, and in the colonies. Justly regarding true religion as the most important interest of society, it was long accepted as an axiom that the interposition and protection of government were indispensable to preserve and disseminate it. When the Protestant reformation had for England broken the bonds of Rome, and established the right



The petition of right declares that no tax, tallage, aid, gift, benevolence, or such like charge, shall be levied without consent of parliament;

That no person shall be deprived of liberty, property or life, but by the lawful judgment of his peers, or by the law of the land;

That neither the command of the King, nor of the Privy Council, shall be a sufficient warrant for imprisonment, *without legal cause shown*, nor any answer to the writ of *habeas corpus*;

That soldiers shall not be billeted upon the people;

That no man shall be adjudged of life or limb by any summary course, as by martial law, or otherwise, nor by virtue of any royal commission, but only according to the laws of the realm;

That no exemption shall be allowed from the punishments denounced against offenders by the laws of the realm.

3<sup>d</sup>. *Habeas Corpus* Act, 31 Car. II, c. 2.

1 Bl. Com. 128; 3 do. 136; 3 Hal. Const. Hist. Eng. & seq.

The *habeas corpus* act requires the Lord Chancellor or any of the twelve (now eighteen) judges in vacation, under *heavy penalties*, and the court of chancery, and the courts of Westminster in term, to grant the writ of *habeas corpus* immediately, upon complaint of illegal imprisonment, and to discharge any person confined without due warrant of law, and for lawful cause. (3 Bl. Com. 136-'7; Bac. Abr. Hab. Corp. (B).)

4<sup>d</sup>. Bill of Rights, 1 Wm. & M. stat. 2, c. 2.

The Bill of Rights of England is the declaration delivered by the Lords and Commons to the Prince and Princess of Orange, 13 Feb. 1688, and afterwards enacted in Parliament, when they had become king and queen, setting forth a summary of the most important popular rights, and claiming them as the "ancient and undoubted rights and liberties" of the people of England. (2 Rap. Eng. 794, B. XXIV; 1 Bl. Com. 128; 3 Hal. Const. Hist. of Eng. 77.)

5<sup>d</sup>. Act of Settlement, 12 & 13 Wm. III, c. 2.

The Act of Settlement limits the crown to the Princess Sophia of Brunswick (granddaughter of James I), "and the heirs of her body, being Protestants," and re-asserts the same "ancient and undoubted rights and liberties," together with some new provisions. (1 Bl. Com. 128; Id. 216; 2 Steph. Com. 489-'90; 3 Hal. Const. Hist. 134.)

2<sup>d</sup>. The Guards for the Absolute Rights provided in England.

1 Bl. Com. 141 & seq.; 2 Steph. Com. 490 & seq.;  
W. C.

1<sup>f</sup>. The constitution, powers and privileges of Parliament.

1 Bl. Com. 141; Id. 146 & seq.; 2 Steph. Com. 490;  
Id. 347 & seq.

2<sup>f</sup>. The limitation of the King's prerogative, by bounds certain and notorious.

1 Bl. Com. 141; Id. 237 & seq.; 2 Steph. Com. 494  
& seq.

3<sup>f</sup>. The free and uncontrolled dispensation of the law in the ordinary courts of justice.

The emphatic words of *Magna Charta*, spoken in the person of the king, who in judgment of law (says Sir Edw. Coke), is ever present, and repeating them in all his courts, are these: "*Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*" (1 Bl. Com. 141-'2; 2 Steph. Com. 490 & seq.)

4<sup>f</sup>. The Right of petitioning the King, or either house of Parliament, for redress.

1 Bl. Com. 143; 2 Steph. Com. 493.

5<sup>f</sup>. The Right of having arms for defence.

1 Bl. Com. 143-'4.

2<sup>d</sup>. The solemn Declarations and Guards of Absolute Rights in Virginia;

These declarations and safeguards are not, as in England, merely such as the ordinary legislature provides, and which therefore it may at pleasure dispense with, but they are declarations and safe-guards provided by the *constitution*, or organic law, which has received the solemn and direct sanction of the people themselves, in their highest sovereign capacity, and which is *a law to the legislature*, all whose acts transcending it are void. The difference, although it has proved less important than had been fondly hoped, is not to be despised, and is of great value so far as the observance of the constitution is secured by the structure of the government, and the equilibrium of its departments;

W. C.

1<sup>e</sup>. The safe-guards in Virginia, of the Rights of Personal Security, and Personal Liberty.

See Cooley's Const. Lim'ns, 256 & seq., 295 & seq.

W. C.

1<sup>f</sup>. Safe-guards against encroachments *by the State Government*; W. C.

1<sup>g</sup>. Prohibition of *ex post facto* laws.

Const. U. S. Art. I, § x, 1; Va. Const. 1869, Art. V, § 14; Fletcher v. Peck, 6 Cr. 87; Cummings



v. *Missouri*, 4 Wal. 277; *Exp. Garland*, 4 Wal. 333, 374; 2 Stor. Const. § 1373; *Gut's case*, 9 Wal. 35.

2<sup>s</sup>. Prohibition of *Bills of Attainder*.

Const. U. S. Art. I, § x, 1; Va. Const. 1869, Art. V, § 14; 2 Stor. Const. § 1344; Id. § 1373; *Drehman v. Stifle*, 8 Wal. 601.

3<sup>s</sup>. Suspension of Writ of *Habeas Corpus* prohibited, unless when in cases of invasion or rebellion, the public safety may require it.

Va. Const. 1869, Art. V, § 14.

4<sup>s</sup>. Prohibition of *General Warrants*, to search *unnamed* places, or to arrest *unnamed* persons.

Va. Const. 1869, Art. I, (Bill of Rights), § 12.

5<sup>s</sup>. Prohibition of excessive bail, excessive fines, and of cruel and unusual punishments.

Va. Const. 1869, Art. I, (Bill of Rights), § 11.

6<sup>s</sup>. In Criminal prosecutions, right secured to demand cause and nature of accusation, to be confronted with accusers and witnesses, and to call for evidence in one's favor.

Va. Const. 1868, Art. I, (Bill of Rights), § 10.

7<sup>s</sup>. Trial secured by impartial jury of vicinage, whose unanimous consent is required to convict.

Va. Const. 1869, Art. I, (Bill of Rights), § 10.

8<sup>s</sup>. Self-crimination not to be compelled.

Va. Const. 1869, Art. I, (Bill of Rights), § 10.

9<sup>s</sup>. Slavery and involuntary servitude (except for crime), abolished, and prohibited for ever.

Const. U. S. Amendm't XIII; Va. Const. 1869, Art. I, (Bill of Rights), § 19.

10<sup>s</sup>. No State to deprive any person of life, liberty, or property without due process of law, nor to deny to any person within its jurisdiction equal protection.

Const. U. S. Amendm'ts, Art. XIV. § 1.

2<sup>f</sup>. Safe-guards against encroachments on Rights of Personal Security, and Personal Liberty, *by the Federal Government*; W. C.

1<sup>s</sup>. Prohibition of *expost facto* laws.

Const. U. S. Art. I, § ix. 3; *Fletcher v. Peck*, 6 Cr. 87; *Calder v. Bull*, 3 Dall, 386; *Cummings v. Missouri*, 4 Wal. 277; *Ex-parte Garland*, 4 Wal. 333; 2 Stor. Const. § 1345; Id. § 1373.

2<sup>s</sup>. Prohibition of Bills of Attainder.

Const. U. S. Art. I, § IX, 3; 4 Bl. Com. 259; 2 Stor. Const. § 1344.

3<sup>s</sup>. Suspension of the Writ of *Habeas Corpus* prohibited, unless when in case of invasion or rebellion, the public safety may require it.



Const. U. S. Art. I, § ix, 2; 2 Stor. Const. § 1338 & seq.

- 4<sup>s</sup>. Prohibition of *General Warrants*, to search unnamed places, or to arrest unnamed persons; and also the quartering of soldiers in private houses.

Const. U. S. Amendm't IV; Id. Art. III; 2 Stor. Const. § 1900 & seq.

- 5<sup>s</sup>. Prohibition of excessive bail, excessive fines, and of cruel and unusual punishments.

Const. U. S. Amendm't VIII; 2 Stor. Const. § 1903-'4.

- 6<sup>s</sup>. Prosecutions for capital, or otherwise infamous crimes, to be only on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.

Const. U. S. Amendm't V; 2 Stor. Const. § 1784 & seq.; *Ex-parte Milligan*, 4 Wal. 3.

- 7<sup>s</sup>. No one for the same offence to be put twice in jeopardy of life or limb.

Const. U. S. Amendm't V; 2 Stor. Const. § 1787.

- 8<sup>s</sup>. Self-crimination not to be compelled.

Const. U. S. Amendm't V; 2 Stor. Const. 1788.

- 9<sup>s</sup>. None to be deprived of life, liberty, or property without due process of law.

Const. U. S. Amendm't V; 2 Stor. Const. 1788-'9.

- 10<sup>s</sup>. Accused to enjoy the right to a speedy, and public trial, by an impartial jury of the State and district wherein the crime was committed.

Const. U. S. Amendm't VI; 2 Stor. Const. § 1791; *Gut's case*, 9 Wal. 37.

- 11<sup>s</sup>. Accused to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for witnesses in his favor; and to have counsel.

Const. U. S. Amendm't VI; 2 Stor. Const. § 1792 & seq.

- 2<sup>o</sup>. The safe-guards in Virginia, of the Right of Private Property; W. C.

- 1<sup>f</sup>. Safe-guards against encroachments *by the State Government*; W. C.

- 1<sup>s</sup>. Prohibition of the taking of private property for public uses, without just compensation.

Va. Const. 1869, Art. V, § 14; 2 Stor. Const. § 1790; *Crenshaw v. Slate, Riv. Co.*, 6 Rand. 245; *Jas. Riv. & Kan. Co. v. Turner*, 9 Leigh, 313; *Jas. Riv. & Kan. Co. v. Thompson & als.*, 3 Grat. 270; *Pumpelly v.*

Gr. Bay Co., 13 Wal. 166; Loan Assoc'n. v. Topeka, 20 Wal. 655; Cooley's Const. Lim. 351 & seq.

2<sup>s</sup>. Prohibition of laws impairing the obligation of Contracts.

Const. U. S. Art. I, § x, 1; Va. Const. 1869, Art. V, § 14; Bronson v. Kinzie & als., 1 How. 311; McCracken v. Hayward, 2 How. 608; Von Hoffman v. City of Quincy, 4 Wal. 548; Curran v. Arkansas, 15 How. 319; Taylor v. Stearns & als., 18 Grat. 244, 262, 272; Quackenbush v. Danks, 1 Denio, (N. Y.) 128; S. C. 3 Denio, 594; State v. Carew, 13 Richards. Law, (S. C.) 506; 2 Stor. Const. § 1374 & seq.; White v. Hart, 13 Wal. 646; Bk. of Old Domin'n v. McVeigh, 20 Grat. 457; Homestead cases, 22 Grat. 288; Antoni v. Wright, 22 Grat. 841, & seq.; Gunn v. Barry, 15 Wal. 622.

3<sup>s</sup>. Reservation of jury-trial in controversies respecting property, and suits between man and man.

Va. Const. 1869, Art. I (Bill of Rights), § 13.

4<sup>s</sup>. Taxation to be only by consent of the people, or their representatives.

Va. Const. Art. I (Bill of Rights), § 8.

5<sup>s</sup>. Taxation to be equal and uniform, and *ad valorem*.

Va. Const. 1869, Art. X, § 1 to 6.

6<sup>s</sup>. State-debt prohibited, (except in a few cases, *e. g.*, public defence, &c.,) whether State be principal or surety.

Va. Const. 1869, Art. X, § 7, 12, 13 to 15.

7<sup>s</sup>. Prohibition of the suspension of laws, save by the legislature.

Va. Const. 1869, Art. I (Bill of Rights), § 9.

8<sup>s</sup>. No money to be paid out of the State-treasury save in pursuance of appropriations made by law; and all acts of appropriation to be determined by *ayes and noes* recorded, and only by a majority of all the members *elected* to each house.

Va. Const. 1869, Art. X, § 10, 11.

9<sup>s</sup>. Prohibition of Duty on Imports or Exports, &c.

Const. U. S. Art. I, § x, 2; 1 Stor. Const. § 1016 & seq.

2<sup>f</sup>. Safe-guards against encroachments on Private Property *by the Federal Government*; W. C.

1<sup>s</sup>. Prohibition of the taking of private property for public uses, without just compensation.

Const. U. S. Amendm'ts V; 2 Stor. Const. § 1790; 2 Kent's Com. 275-'6; 1 Tuck. Bl. Appx. 305-'6.

2<sup>s</sup>. Reservation of Jury-trial in Suits at Common law, where the value exceeds \$20.

Const. U. S. Amendm'ts V; 2 Stor. Const. § 1769 & seq.

- 3<sup>s</sup>. *Direct* taxation, (i. e. of lands and persons,) to be apportioned amongst the States, according to population; *Indirect* to be uniform.

Const. U. S. Art. I, § ii, 3; Id. § viii, 1; 1 Stor. Const. § 954 & seq.; Id. § 630 & seq.; Id. § 951, &c.; *Veazie Bank v. Fenno*, 8 Wal. 533.

- 4<sup>s</sup>. Prohibition of Duty on Exports.

Const. U. S. Art. I, § ix, 5; 1 Stor. Const. § 1013 & seq.

- 5<sup>s</sup>. Prohibition of preference of ports of one State over those of another.

Const. U. S. Art. I, § ix, 6.

- 3<sup>o</sup>. The Safe-guards in Virginia, of the Right of Freedom of Conscience; W. C.

- 1<sup>f</sup>. Safe-guards against encroachments *by the State government*; W. C.

- 1<sup>s</sup>. Declaration that all men are equally entitled to the free exercise of religion, according to the dictates of conscience.

Va. Const. 1869, Art. I (Bill of Rights), § 18.

- 2<sup>s</sup>. Prohibition of any restraint in respect of religious worship, or belief, or support of ministry; or of religious test, &c. (Va. Const. 1869, Art. V, § 14.)

- 2<sup>f</sup>. Safe-guards against encroachments *by the Federal government*; W. C.

Congress is to make no law respecting an establishment of religion, or prohibiting the free exercise thereof. (Const. U. S. Amendm'ts, I; Cooley's Const. Lim. 467 & seq.)

- 4<sup>e</sup>. The constitutional provisions intended to secure all these Rights; W. C.

- 1<sup>f</sup>. Against encroachments *by the State government*; W. C.

- 1<sup>s</sup>. Freedom of the press secured, and also of speech.

Va. Const. Art. I (Bill of Rights), § 14.

- 2<sup>s</sup>. Declaration that equal civil and political rights and public privileges belong to all citizens of the State.

Va. Const. 1869, Art. I (Bill of Rights), § 20; Const. U. S. Amendm'ts. Art. XIII, § 1; Id. Art. XIV, § 1.

- 3<sup>s</sup>. Declaration that a Militia is the natural and safe defence of a free State; that standing armies in time of peace are dangerous to liberty, and that in all cases the military should be subordinate to the civil power. (Va. Const. 1869, Art. I (Bill of Rights), § 15.)

- 2<sup>f</sup>. Constitutional provisions to secure all the Absolute Rights against encroachments *by the Federal government*; W. C.

1<sup>s</sup>. Freedom of speech and of the press secured.

Const. U. S. Amendments, Art. I; Cooley's Const. Lim. 414 & seq.

2<sup>s</sup>. Right peaceably to assemble, and petition Government for a redress of grievances, secured.

Const. U. S. Amendm'ts. Art. I.

3<sup>s</sup>. Right to keep and bear arms not to be infringed.

Const. U. S. Amendm'ts. Art. II; Cool. Const. Lim. 350.

2<sup>b</sup>. Relative Rights which concern the Person, in respect to Natural Persons.

Being rights, with their correspondent duties, which concern or relate to the person, and belong to persons, as they are *members of society*, and stand in various relations to each other, either (1), Public, or (2), Private. (1 Bl. Com. 145); W. C.

1<sup>c</sup>. The Public Relations, and the rights and correspondent duties belonging thereto.

We are to discuss under this head, (1), The rights which concern persons in the relation of magistrates; and (2), The rights which concern persons in the relation of people; W. C.

1<sup>d</sup>. The Relation of Magistrates, and the rights and correspondent duties belonging thereto;

Magistrates are either (1), Supreme; or (2), Subordinate; and the doctrines touching the rights and correspondent duties growing out of the relation are to be disposed accordingly. (1 Bl. Com. 146 & seq.)

W. C.

1<sup>e</sup>. Supreme Magistrates.

The supreme magistracy in England consists of (1), The Supreme Legislature, or Parliament; and (2), The Supreme Executive, or King; as to the Judiciary, that is treated by Blackstone as an emanation from, and a branch of the Executive department.

W. C.

## CHAPTER II.

### OF THE PARLIAMENT.

1<sup>f</sup>. The Legislature in England, or Parliament.

We may explore what is most necessary to be known touching the parliament of England, or rather, as it now is, of Great Britain and Ireland, by adverting to (1), The original and antiquity of parliament; (2), The

manner of the summons and assembling of parliament; (3), The constituent parts of the parliament; (4), The laws and customs of parliament; (5), The mode of proceeding in parliament; and (6), The mode of dissolution of parliament. (1 Bl. Com. 146 & seq.; Bac. Abr. Court of Parliament; Id. Statute.)

W. C.

1<sup>s</sup>. The original and antiquity of Parliament.

A general council has been held immemorially in England, under the several names of *michel-synoth*, or great synod, *michel-gemote*, or great meeting, *wittena-gemote*, or meeting of wise men, *commune concilium*, *curia magna*, *assisa generalis*, and since the Conquest, *Parliament*, or assembly for conference. (1 Bl. Com. 147, & seq.; Bac. Abr. Court of Parliament (A); 1 Hal. Const. Hist. of Eng. 2 & seq.; Stubbs' Const. Hist. 566.)

2<sup>s</sup>. The Manner of the summons and assembling of Parliament.

Summoned by the *King's writ*, issuing out of chancery, and addressed to each lord of parliament, commanding his attendance; and to every sheriff of every county, for the election of knights, citizens and burgesses, within their respective counties. (1 Bl. Com. 150; Bac. Abr. Court of Parliament, (C).)

The Convention-parliaments, which in 1660 restored Charles II, and in 1688 disposed of the crown and kingdom to William and Mary, are justified by the *peculiar necessities* of those occasions. (1 Bl. Com. 151-'2; 2 Hal. Const. Hist. 225, 238; 3 do. 70 & seq.)

At the return of the writ, the parliament does not begin but in the presence of the King, either in person or by representative, empowered by *letters-patent*, under the great seal, if the King be out of the realm, or by *commission* under the great seal, if he be within it. (Bac. Abr. Court of Parliament, (C).)

3<sup>s</sup>. The constituent parts of the Parliament.

The constituent parts of the parliament are, (1), The king or queen; (2), The lords, spiritual and temporal; and (3), The commons. Each part has a *negative*, or necessary voice in making all laws. (1 Bl. Com. 153 & seq; Bac. Abr. Court of Parliament, (C).)

W. C.

1<sup>h</sup>. The King or Queen reigning.

1 Bl. Com. 153 & seq.

2<sup>h</sup>. The lords spiritual, and the lords temporal.

They seem to have been originally designed as distinct *estates*, and are so named in Acts of Parliament,

but in practice, they intermix in debate, and in votes, and a majority of the whole determines the action of the assembly. (1 Bl. Com. 156.)

W. C.

1<sup>l</sup>. What lords spiritual are peers of Parliament.

The Archbishops of Canterbury and York, respectively, one Irish Archbishop, and twenty-four English bishops, and three Irish bishops, the Irish prelates sitting by rotation. (1 Steph. Com. 358; 1 Bl. Com. 155, n (8); 1 Broom. & H. Com. 129, n (e)), \*

2<sup>l</sup>. What temporal lords are peers of Parliament.

All the peers of England, by whatever title of nobility distinguished, dukes, marquises, earls, viscounts, or barons; sixteen peers chosen for one parliament, who represent the Scottish nobility; and twenty-eight Irish peers, chosen for life. (1 Bl. Com. 157; Id. 97; 2 Steph. Com. 359-'60.)

3<sup>l</sup>. The peculiar privileges of the lords, besides their *judicial* capacity.

1 Bl. Com. 167-'8; Steph. Com. 373 & seq.

W. C.

1<sup>k</sup>. To hunt in the King's forests, severally, going and returning.

1 Bl. Com. 167.

2<sup>k</sup>. To be attended in their own body, by the judges, and the law-officers of the crown, *ad tractandum, et consilium impendendum*, though not *ad consentiendum*.

1 Bl. Com. 168; 2 Steph. Com. 373-'4.

3<sup>k</sup>. To make each, another lord of Parliament his *proxy*, to vote for him in his absence.

Originally, this privilege was by license from the crown, which the King has sometimes refused, but now it is such a mere form that a license is *presumed*. (1 Bl. Com. 168, n (30) & (31); 2 Steph. Com. 374.)

4<sup>k</sup>. To enter each, a Protest, with his reasons, on the journals, against any vote from which he dissents.

1 Bl. Com. 168, & n (32); 2 Steph. Com. 374.

5<sup>k</sup>. That bills affecting the right of the peerage shall originate in the House of Lords, and shall suffer no changes in the Commons.

1 Bl. Com. 168.

6<sup>k</sup>. That the sixteen representative peers of Scotland,

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\* NOTE.—The recent dis-establishment of the Irish Church doubtless deprives it of representation in Parliament.

and the twenty-eight representative peers of Ireland, shall be chosen by the nobility of those countries respectively, the Scots for one parliament, the Irish for life.

1 Bl. Com. 169; Id. 97; 2 Steph. Com. 375.

3<sup>b</sup>. The Commons, or Representatives of the people.

Let us observe in this connection, (1), Who compose the Commons house of parliament; (2), Election of members of parliament; (3), The peculiar privileges of the Commons. (1 Bl. Com. 158 & seq; Id. 169 & seq; 2 Steph. Com. 362 & seq; Id. 375 & seq.)

W. C.

1<sup>a</sup>. Who compose the Commons house of Parliament.

Representatives chosen by the people; those from the counties (elected by the proprietors of lands, &c.), being styled *Knights of Shires*; those from cities and boroughs, *Citizens and Burgesses*; and those from the two universities, simply *Representatives*. (1 Bl. Com. 159; 2 Steph. Com. 362-'3.)

2<sup>a</sup>. Elections of Representatives in Parliament.

Herein consists the exercise of the democratical part of the Constitution of England, whereby the requisite honesty of intention towards the body-politic is supposed to be blended with the required wisdom, knowledge, and capacity for deliberation. (1 Bl. Com. 170-'71.) We will take notice of, (1), The qualifications of the electors; (2), The qualifications of the elected; and (3), Writs of election and modes of proceeding therein;

W. C.

1<sup>b</sup>. The Qualifications of the Electors, and the Incapacities which Disqualify.

The object is to exclude such persons as, from their *dependent position*, are esteemed to have no will of their own; such as have proved by their ill-conduct their unfitness to exercise so important a trust; and such as want the requisite discretion and understanding to exercise it;

W. C.

1<sup>a</sup>. Qualifications of Electors; W. C.

1<sup>m</sup>. Qualifications of Electors of *Knights of Shires*; W. C.

1<sup>n</sup>. The *estate* in respect of which they may vote.

Freeholds, and certain leaseholds, of a prescribed value and duration. (2 Steph. Com. 380; 2 Wm. IV, c. 45.)

2<sup>a</sup>. Registration.

The voter must have been *duly registered*,



which is required to be done annually, by the overseers of parishes. (2 Steph. Com. 381-'2.)

2<sup>m</sup>. Qualifications of Electors of *Citizens and Burgesses*; W. C.

1<sup>a</sup>. The *estate*, &c., in respect of which they may vote.

It is necessary for the most part to be a "Burgess or freeman," or "Freeman and liveryman," or "Freeholder or burgage-tenant," with various qualifications. (2 Steph. Com. 284 & seq; 2 Wm. IV, c. 45.)

2<sup>a</sup>. Registration.

As in the counties. (2 Steph. Com. 388.)

3<sup>m</sup>. Qualifications of Electors of Representatives of *the two Universities*, and of *that of Dublin*.

The representation of the two Universities was only permitted regularly, *temp.* Jac. I; and that of Dublin, since the union with Ireland. (1 Bl. Com. 174; 2 Steph. Com. 384; Id. 393.)

2<sup>l</sup>. Incapacities and disqualifications of Electors.

2 Steph. Com. 389.

2<sup>k</sup>. Qualifications of the Elected.

The qualifications of the elected are determined in part by the law and custom of parliament, declared by the House of Commons, and in part by certain statutes. (1 Bl. Com. 175, &c.; 2 Steph. Com. 390 & seq.)

W. C.

1<sup>l</sup>. Qualifications in respect to citizenship, age, and understanding.

Aliens-born, minors, idiots, and mad-men, are disqualified. (2 Steph. Com. 390.)

2<sup>l</sup>. Qualifications in respect to previous conduct and character.

Persons attainted of treason or felony, outlawed on criminal prosecution, guilty of bribery or treating at elections (for that time and place), and declared bankrupt (for the next twelve months, &c.), are disqualified. (2 Steph. Com. 390; 1 Bl. Com. 175.)

3<sup>l</sup>. Qualifications in respect to the occupancy of some other office or post (ministerial or judicial), or some emolument from the crown.

Peers (of *England*), judges, clergymen, sheriffs, mayors, and bailiffs (within their respective jurisdictions); occupants of any office under the crown; contractors and pensioners, are disqualified. (2 Steph. Com. 392; 1 Bl. Com. 175-'6.)



4<sup>1</sup>. Qualifications in respect of *Estate*;  
W. C.

1<sup>m</sup>. Qualifications for Knights of Shires.

Real estate, &c., to the clear *annual* value of £600, &c. (2 Steph. Com. 392; 1 Bl. Com. 176.)

2<sup>m</sup>. Qualifications for Citizens and Burgesses.

Real estate, &c., to the clear annual value of £300, &c. (2 Steph. Com. 393; 1 Bl. Com. 176.)

3<sup>m</sup>. Qualifications for members of the Universities of Oxford and Cambridge, and of Trinity College, Dublin.

No estate required. (2 Steph. Com. 393.)

5<sup>1</sup>. Special Disqualifications.

A disqualification may arise for *that* Parliament, by vote of House of Commons, and *for ever* by statute. (2 Steph. Com. 393; 1 Bl. Com. 176, and n (25).)

The exclusion of lawyers by ordinance of *House of Lords*, (6 Hen. IV), was unconstitutional. The parliament is branded with the name of *parliamentum indoctum*, or the lack-learning parliament, and Lord Coke says, that "there was never a good law made thereat." (1 Bl. Com. 176.)

3<sup>2</sup>. Writs of Election, and modes of proceeding therein.

As soon as the parliament is summoned, the lord chancellor (or if the vacancy happen during the sitting of parliament, the speaker, by order of the house, &c.,) sends his warrant to the clerk of the crown in chancery; who thereupon issues writs of election to the sheriffs, &c. (2 Steph. Com. 394 & seq.; 1 Bl. Com. 177 & seq.)

3<sup>1</sup>. The peculiar privileges of the Commons.

It is the peculiar privilege of the Commons to originate all bills granting subsidies or parliamentary aids, or levying money in any way, whether by taxes, or pecuniary mulcts for offences;—it being supposed that as they are a temporary elective body, freely nominated by the people, they are less likely to be improperly influenced by the Crown, than the permanent hereditary body of the Lords, and so constitute the safest depository of the vital power of taxation. (1 Bl. Com. 169–'70; 2 Steph. Com. 375.)

4<sup>2</sup>. The laws and customs of parliament considered as one aggregate body.

1 Bl. Com. 160 & seq.; 2 Steph. Com. 364;

1<sup>h</sup>. The power and jurisdiction of parliament is transcendent and absolute, confined within no bounds.

1 Bl. Com. 160 & seq.

2<sup>h</sup>. Each house is the exclusive judge of the right of its members to sit, and of its own privileges.

1 Bl. Com. 164 & seq.

3<sup>h</sup>. The most notorious privileges of either house.

The most important privileges of parliament consist of the privilege of speech, (but not of publication of speech), and freedom from imprisonment save for indictable offences, in which case the house to which the person accused belongs, is entitled to be immediately informed of the arrest, and of the cause of it.

(1 Bl. Com. 164 & seq.)

5<sup>s</sup> Mode of proceeding in Parliament; W. C.

1<sup>h</sup>. Each house has its Speaker.

The speaker of the House of Lords is the lord chancellor, or keeper of the great seal, or any other appointed by the King's commission. The speaker of the House of Commons is elected by the house, but must be approved by the King. In either House a majority determines. In the House of Commons, the speaker never votes, save in case of a tie; in the Lords' House, the speaker, if a member, votes with the rest, but has no *casting voice*. (1 Bl. Com. 181, & n (73).)

2<sup>h</sup>. Mode of passing Bills.

1 Bl. Com. 181 & seq.; 2 Steph. Com. 405 & seq.; *Ante*. Introd. § III, 2<sup>a</sup>.

3<sup>h</sup>. Mode of Adjournment, and of Prorogation;

An adjournment is no more than a continuance of the session from *one day to another*, as the word signifies, and may be done by either house separately. It does not put an end to unfinished business, which at the next meeting may be proceeded with, without any fresh commencement. (1 Bl. Com. 186.)

A prorogation is a continuance of the parliament *from one session to another*, and is done by royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation. Both houses are necessarily prorogued at the same time. (1 Bl. Com. 187.)

6<sup>s</sup>. Mode of Dissolution of Parliament.

Dissolution is the civil death of the parliament;

W. C.

1<sup>h</sup>. Dissolution is effected by the King's will, expressed either in person, or by representation.

1 Bl. Com. 188;

2<sup>a</sup>. Dissolution effected by the demise of the crown:

At common law, immediately upon the death of the reigning sovereign; by statutes 7 & 8 Wm. III, and 6 Anne, six months afterwards, unless sooner prorogued or dissolved by the successor. (1 Bl. Com. 188.)

3<sup>a</sup>. Dissolutions effected by length of time; W. C.

1<sup>i</sup>. Doctrine at common law.

The duration of parliament was only limited by the pleasure or death of the King, although it was required, at least by very early statutes (4 Edw. III, and 36 Edw. III), *to be assembled* every year. (1 Bl. Com. 189, n (83); Id. 153.)

2<sup>i</sup>. Doctrine by Stat., 6 Wm. & M. c. 2, and 16 Car. II, c. 1.

That a new parliament shall be called within three years after the *determination* of the former, and that the *sittings* shall not be intermitted above three years at the most. (1 Bl. Com. 153, and n (6).)

3<sup>i</sup>. Doctrine by Stat. 1 Geo. I.

That a parliament *may* endure *seven* years. (4 Bl. Com. 189.)

## CHAPTER III.

### OF THE KING AND HIS TITLES.

2<sup>f</sup>. The King, or Supreme Executive power.

So much as is necessary to be known touching the King may be stated under the heads following, namely: (1), The title to the crown; (2), The King's royal family; (3), The King's councils; (4), The King's duties; (5), The King's prerogative; (6), The King's revenue. (1 Bl. Com. 190.);

W. C.

1<sup>f</sup>. The title to the Crown.

Out of regard to the public tranquillity, the rule of succession to the throne ought to be clear and indisputable. To that end, the crown is by common law and constitutional custom, *hereditary*; and this in a manner peculiar to itself; but that right of inheritance may from time to time be changed or limited by *act of parliament*; under which limitations, the crown still continues hereditary. (1 Bl. Com. 190-'91.)

W. C.

1<sup>a</sup>. The attributes of the succession to the Crown. W. C.

1<sup>i</sup>. The crown is in general *hereditary*, or descendible

to the next heir, on the death or demise of the last occupant of the throne.

Succession by *election*, which would otherwise be the most natural and expedient mode of succession, proves upon experiment to give too much scope to faction, intrigue and violence. (1 Bl. Com. 191 & seq.)

2<sup>1</sup>. Mode of descent of the Crown.

In general the same as in case of lands, preferring males to females, and amongst males, the eldest; but a similar preference of the eldest exists as to the crown amongst *females* also, the régál functions being indivisible. Nor is the half-blood excluded. (1 Bl. Com. 193-4.)

3<sup>1</sup>. The hereditary right to the Crown is not *indefeasible*.

Parliament (consisting of King, Lords and Commons), may alter the line of descent, exclude the immediate heir, and vest the inheritance in any one else. (1 Bl. Com. 195.)

4<sup>1</sup>. However the Crown be limited or transferred, it is still hereditary in the wearer.

1 Bl. Com. 196.

2<sup>h</sup>. Historical view of the succession to the Crown of England.

1 Bl. Com. 196, & seq.; 2 Steph. Com. 441, & seq.

## CHAPTER IV.

### OF THE KING'S ROYAL FAMILY.

2<sup>s</sup>. The King's Royal Family.

1 Bl. Com. 217, & seq.; 2 Steph. Com. 465, & seq.; W. C.

1<sup>h</sup>. The Queen; Wherein of

1<sup>1</sup>. The queen regent, regnant, or sovereign.

Has the same powers, prerogatives, rights, dignities and duties as if she had been a king; *e. g.*, Queen Mary, Queen Elizabeth, Queen Anne, and Queen Victoria. (1 Bl. Com. 217, & seq.)

2<sup>1</sup>. The Queen-consort.

The wife of the reigning king, by virtue of her marriage, has divers prerogatives above other women; *e. g.*, she is a public person, distinct from the king; pays no toll, is liable to no amercement in any court; but is still the King's *subject*, not his equal; she has many pecuniary advantages, and in point of security of life and limb has the same pro-

tection as the King. If accused of treason, she is tried by the peers of parliament. (1 Bl. Com. 218, & seq.)

The husband of a queen regnant is her subject, as George of Denmark to Queen Anne, and Prince Albert to Queen Victoria. (1 Bl. Com. 222.)

3<sup>d</sup>. The Queen-dowager.

The Queen-dowager is the widow of the King, and enjoys most of the privileges belonging to her as queen-consort. (1 Bl. Com. 223.)

2<sup>d</sup>. The Prince of Wales, or heir apparent to the crown, his royal consort, and the princess-royal, or eldest daughter of the King.

These are all by law peculiarly protected, because next in succession to the crown. (1 Bl. Com. 223, & seq.)

3<sup>d</sup>. The king's younger children and grandchildren.

Being out of the immediate line of succession, they are entitled only to a certain degree of precedence before all peers and public officers. (1 Bl. Com. 224, & seq.; 2 Steph. Com. 472, & seq.)

4<sup>d</sup>. More remote relations of the king.

Entitled not even to place or precedence, except what belongs to them by their personal rank or dignity. (1 Bl. Com. 225.)

## CHAPTER V.

### OF THE COUNCILS BELONGING TO THE KING.

3<sup>d</sup>. The Councils belonging to the King; W. C.

The councils belonging to the King consist of (1), The high court of Parliament; (2), The peers of the realm; (3), The judges; and (4), The Privy Council; W. C.

1<sup>d</sup>. The High Court of Parliament.

Already treated of, *Ante*, p. 68, 1<sup>st</sup>, &c.

2<sup>d</sup>. The Peers of the Realm.

By virtue of their peerage they are hereditary counsellors of the crown, and may be called together by the King to impart their advice, either in time of parliament or when no parliament is sitting. (1 Bl. Com. 227, & seq.)

3<sup>d</sup>. The Judges of the Courts of Law, for law-matters.  
1 Bl. Com. 229.

4<sup>d</sup>. The Privy Council.

Called, by way of eminence, *the Council*, and described by Sir Edward Coke as a noble, honorable, and reverend assembly of the King, such as he *wills to be of his privy council*. And as the *King's will* solely constitutes a privy councillor, so his will regulates the number, which anciently was about twelve, but having been inconveniently increased, it was by Charles II (in 1679) limited to thirty, and has since been again augmented, and is now indefinite. The inconvenience is obviated by ordinarily summoning to advise the sovereign those only who hold the principal offices of State, who are styled *Cabinet-ministers*. (1 Bl. Com. 230, & n (2); 2 Steph. Com. 480.);

W. C.

1<sup>l</sup>. The Qualifications of a Privy Councillor.

Must be a natural-born subject of England. (2 Steph. Com. 481; 1 Bl. Com. 230.)

2<sup>l</sup>. The duty of a Privy Councillor.

1 Bl. Com. 230; 2 Steph. Com. 481.

To advise the King honestly; to be secret; to avoid corruption; firmly to maintain the resolves of the council; and in all things to act the part of a good and true counsellor.

3<sup>l</sup>. The power of the Privy Council.

1 Bl. Com. 231; 2 Steph. Com. 481.

W. C.

1<sup>k</sup>. To enquire into all offences against the government, and to commit the offenders.

But not to punish them, nor to place them beyond the reach of the writ of *habeas corpus*. (1 Bl. Com. 231; 2 Steph. Com. 481.)

2<sup>k</sup>. To exercise certain judicial powers;

W. C.

1<sup>l</sup>. Mode of Administering the Judicial Power.

This judicial power is administered by a committee of privy councillors, called the *Judicial Committee of the Privy Council*, who hear the allegations and proofs, and report to the King in council, by whom the judgment is finally given. The Judicial Committee consists of the lord president of the council, the lord chancellor, the occupants of certain judicial offices for the time being, and all members of the council who have been president, chancellor, or who have held any of the said judicial offices. (2 Steph. Com. 482-'3.)

W. C.

2<sup>l</sup>. Cases wherein the Privy Council has Judicial Power.

2 Steph. Com. 482.

W. C.

1<sup>m</sup>. Colonial causes arising out of the jurisdiction of the kingdom.

2<sup>m</sup>. Appeals from the lord-chancellor, in matters of lunacy, or idiocy.

3<sup>m</sup>. Appeals from the Ecclesiastical and Maritime Courts.

4<sup>m</sup>. Applications to prolong the terms of patents for new inventions, and to license the re-publication of books under the copyright act.

5<sup>m</sup>. Questions between two provinces out of the realm; and claims asserted to an island or province, as a feudal principality.

Upon principles of feudal sovereignty.

6<sup>m</sup>. Appeals from the Colonial Courts.

## CHAPTER VI.

### OF THE KING'S DUTIES.

#### 4<sup>s</sup>. The King's Duties.

The principal duty of the King is to govern his people *according to law*. *Nec regibus infinita aut libera potestas*, was the constitution of our German ancestors, according to Tacitus. And this is strongly expressed, not only by Bracton and Fortescue, but also in the Year-books (19 Hen. VI, 63)—“*La ley est le plus haute inheritance que le roy ad : car par la ley il même et tous ses sujets sont nelés, etsi le ley ne fuit, nul roi, et nul inheritance sera.*” It is also preserved and sanctioned by the terms of the coronation-oath: “I solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, *according to the statutes in parliament agreed on, and the laws and customs of the same,*” &c. (1 Bl. Com. 233, & n (1), & seq.)

## CHAPTER VII.

### OF THE KING'S PREROGATIVE.

#### 5<sup>s</sup>. The King's Prerogative.

The word *prerogative* signifies that special pre-eminence which the King has, in right of his royal dignity, above all other persons, and out of the ordinary course

of the common law. It is not denied to the subjects of England to discuss and examine its limits, so it be done with decency and respect, notwithstanding the absurd claims to the contrary advanced by Queen Elizabeth, and the Stuart princes who immediately succeeded her. But such was never the language of the ancient constitution and laws. Thus Bracton states it as a maxim of the English law, that "*rex debet esse sub lege, quia lex facit regem,*" and says, "*nihil enim aliud potest rex, nisi id solum quod de jure potest;*" and even in the reign of Charles I, Sir Henry Finch, whilst he lays down the law of prerogative in very strong and emphatic terms, yet qualifies it with the general restriction that "the King's prerogative stretcheth not to the *doing of any wrong.*" (1 Bl. Com. 238-'9; 2 Steph. Com. 485-'6.)

W. C.

1<sup>h</sup>. The King's *incidental* prerogatives.

Being only exceptions in favor of the crown to the general rules established for the rest of the community; *e. g.*, that no costs can be recovered against the King; that he cannot be a joint-tenant; that his debt shall be preferred to other debts, &c. These will be considered in connection with the general rules to which they are exceptions. (1 Bl. Com. 240.)

2<sup>h</sup>. The King's *direct* prerogatives; W. C.

1<sup>i</sup>. The direct prerogatives which relate to the King's *dignity*, or political character.

Being certain qualities inherent in his royal capacity, distinct from and superior to those of any other individual in the nation, the design of which is to secure to him that reverence, respect and obedience which his high functions demand. (1 Bl. Com. 241 & seq.);

W. C.

1<sup>k</sup>. The King's personal sovereignty, or pre-eminence.

Hence he is exempt from all jurisdiction, civil and criminal, as the tranquility and order of society require that he should be. (1 Bl. Com. 242; Montesq. Sp. of Laws, B. XI, c. 6.)

W. C.

1<sup>l</sup>. The protection afforded to the subject against the crown's invasion of rights by *private injuries*;  
W. C.

1<sup>m</sup>. Private injuries in point of property.

The subject may petition the King in his court of chancery, where redress will be afforded as a matter of grace. (1 Bl. Com. 243.)



2<sup>m</sup>. Private injuries in point of person.

They cannot frequently occur, and when they do, it is deemed better as a choice of evils to submit to them, than to endanger the public peace and security, by subjecting the sovereign to answer. (1 Bl. Com. 243.)

2<sup>l</sup>. The protection afforded against the Crown's public oppressions; W. C.

1<sup>m</sup>. Ordinary public oppression.

Such oppression can only exist by the advice of evil counsellors, and the assistance of wicked ministers (the King being capable of performing no ministerial act *in person*), and these may be examined and punished. (1 Bl. Com. 244.)

2<sup>m</sup>. Extraordinary public oppressions tending to dissolve the Constitution.

These are revolutionary proceedings, the occurrence of which the law cannot suppose. If they do unfortunately happen, they must be met by corresponding revolutionary and extraordinary remedies, as in the case of Charles I, and James II. (1 Bl. Com. 244—'5.)

2<sup>k</sup>. The King's *absolute perfection*; W. C.

1<sup>l</sup>. The King *can do no wrong*.

This ancient and fundamental maxim means only that whatever is exceptionable in the conduct of public affairs, is to be imputed to the King's advisers and ministers, and not to himself *personally*; and that the prerogative being created for the benefit of the people, cannot be exerted to their prejudice. (1 Bl. Com. 246.)

2<sup>l</sup>. The King *can think no wrong*.

Which means that the King can never *mean* to do an unwise or an injurious action, and whatever of that character proceeds from him is attributed to mere fraud and deception, which renders the act void. (1 Bl. Com. 246.)

This personal perfection, however, does not preclude the temperate and respectful discussion of the King's conduct, even by individuals, and much less in parliament. (1 Bl. Com. 247.)

3<sup>l</sup>. The King can be guilty of no *laches*, or negligence.

Hence no delay will bar his right. The ancient maxim is *nullum tempus occurrit regi*, it being intended that the King is always *busied for the public good*, and has not leisure to assert his rights.

Neither can the King be affected with an at-

tainder for treason or felony; nor by infancy. (1 Bl. Com. 247-'8.)

3<sup>k</sup>. The King's *perpetuity*.

In his political capacity, the King *never dies*. There is in law no *interregnum*. Upon the death of the reigning prince, his kingship is vested at once in his heir, who is *eo instanti* King. (1 Bl. Com. 249.)

2<sup>l</sup>. The direct prerogatives which regard the King's *authority*.

In the execution of these consists the *executive part* of the government, which is vested in a *single hand*, in order to secure unity and strength, the King being not only the *chief*, but properly the *sole*, executive magistrate, all others acting by commission from, and in subordination to him. The restraint consists in the responsibility of his advisers and ministers. (1 Bl. Com. 250 & seq.)

W. C.

1<sup>k</sup>. The King's authority in *foreign concerns*; W. C.

1<sup>l</sup>. The power to send and receive Ambassadors.

Ambassadors and other public ministers are employed to conduct the intercourse between independent States, and in order that they may attend fearlessly to the interests of the State they represent, they enjoy, amongst other privileges, the important one of exemption from the local jurisdiction, civil and criminal, of the foreign State to which they are accredited. (1 Bl. Com. 253 & seq.)

2<sup>l</sup>. The power to make Treaties.

The ministry being responsible. (1 Bl. Com. 257.)

3<sup>l</sup>. The power of making War and Peace.

Subject to the responsibility of the ministry. (1 Bl. Com. 257-'8.)

4<sup>l</sup>. To issue letters of *Marque and Reprisal*,

Empowering private persons to go beyond the *marches*, or boundaries of the realm, and to commit reprisals upon the commerce of another State, in order to obtain redress for an injury. It is a state of incipient war, and generally results in war. (1 Bl. Com. 258.)

5<sup>l</sup>. To grant Safe-Conducts.

Usually applicable to a *time of war*, being a permission to foreigners to enter or to remain in the country. In peace the permission is generally called a *passport*. (1 Bl. Com. 259.)

2<sup>k</sup>. The King's authority in *domestic affairs*.

1 Bl. Com. 261, & seq.

W. C.

1<sup>1</sup>. The King is a constituent part of the supreme legislative power—that is, of parliament.

He has the *veto-power*, and is not bound by any act of parliament, unless he is named therein by special words. (1 Bl. Com. 261-'2.)

2<sup>1</sup>. The King is *generalissimo* of the kingdom.

He may raise and regulate fleets, armies, forts, &c.; may appoint *ports and havens* where—and where only—persons and merchandise may pass into and out of the realm; may regulate the erection of beacons, light-houses, and sea-marks; may prohibit the importation of arms or ammunition; and by writ of *ne exeat regno* may confine his subjects from going abroad. (1 Bl. Com. 262, & seq.)

3<sup>1</sup>. The King is the *fountain of justice*, and general conservator of the peace of the kingdom.

That is, he is the source whence justice is *distributed*, the courts (which he may erect at pleasure), being the necessary *conduits* through which it is transmitted to the people. Hence, the proceedings in the courts were *in his name*, and the courts are designated the *King's Courts*. (1 Bl. Com. 266, & seq.)

W. C.

1<sup>m</sup>. The early practice in administering justice.

By the King *in person*. (1 Bl. Com. 267.)

2<sup>m</sup>. The modern practice in administering justice.

By judges appointed by the King, but who hold, not as formerly, *durante bene placito*, but (by Statute 13 Wm. III, and further, by Statute 1 Geo. III), notwithstanding the demise of the crown, *quamdiu bene se gesserint*. They are removable, however, on the address of both houses of parliament.

3<sup>m</sup>. In criminal proceedings the Crown is the *prosecutor*, through its appointed officers.

1 Bl. Com. 268.

4<sup>m</sup>. Reasons for separating the Judicial power from the Executive and Legislative, respectively.

1 Bl. Com. 269; Montesq. Sp. of Laws, B. XI, ch. VI.

5<sup>m</sup> The King's pardoning power.

1 Bl. Com. 269.

6<sup>m</sup>. The King's legal *ubiquity*.

In the eye of the law he is always present (that is, the *legal office* is) in all his courts, and

he is never said to appear *by attorney*. (1 Bl. Com. 270.)

7<sup>m</sup>. The King's prerogative of using proclamations.

Not to ordain *new laws*, but to enjoin the observance of those already in being; and also to give general instructions to the subjects touching matters within the King's cognizance. (1 Bl. Com. 270-'71.)

4<sup>l</sup>. The King is the *fountain of office, of honor, and of privilege*.

That is, he is not merely the *distributor* (as in case of *justice*), but the *parent* of them. It is supposed that the King (being charged with the function of executing the laws) is a better judge than any one else of the merits of those whom he will employ, and ought to have it in his power to encourage fidelity and zeal by promotions and distinctions. (1 Bl. Com. 271-'2.)

5<sup>l</sup>. The King is the arbiter of commerce.

That is, of domestic commerce only. (1 Bl. Com. 273, & seq.);

W. C.

1<sup>m</sup>. Establishment of public Marts, such as markets and fairs.

1 Bl. Com. 274.

2<sup>m</sup>. The regulation of weights and measures.

1 Bl. Com. 274, & seq.

3<sup>m</sup>. To coin money, and regulate the value thereof.

1 Bl. Com. 276, & seq.

6<sup>l</sup>. The King is the Head and Supreme Governor of the National Church.

1 Bl. Com. 278, & seq.

3<sup>l</sup>. The direct prerogatives which regard the King's revenue.

Treated of under the next head of the King's Revenue, *infra*, 6<sup>s</sup>.

## CHAPTER VIII.

### OF THE KING'S REVENUE.

6<sup>s</sup>. The King's Revenue; W. C.

1<sup>h</sup>. The King's Ordinary Revenue.

1 Bl. Com. 282, & seq.;

W. C.

1<sup>l</sup>. The King's Ordinary Revenue derived from Ecclesiastical Sources; W. C.

1<sup>k</sup>. The Custody of the temporalities of Bishops, during vacancies.

1 Bl. Com. 282-'3.

2<sup>k</sup>. A Corody for the maintenance of a royal Chaplain from each Bishop.

1 Bl. Com. 283.

3<sup>k</sup>. Tithes arising in *extra-parochial* places.

1 Bl. Com. 284.

4<sup>k</sup>. First fruits, and the tenths of all spiritual preferments.

1 Bl. Com. 284, & seq.

2<sup>l</sup>. The King's Ordinary Revenue derived from Temporal Sources.

1 Bl. Com. 286, & seq.

W. C.

1<sup>k</sup>. Rents and profits of the demesne-lands (*dominicales terræ*) of the Crown.

1 Bl. Com. 286.

2<sup>k</sup>. Profits derived from the military tenures *in capite*.

Abolished by Stat. 12 Car. II, c 24. (1 Bl. Com. 287-'8.)

3<sup>k</sup>. Profits derived from Wine-licenses.

1 Bl. Com. 288.

4<sup>k</sup>. Profits derived from the ordinary Courts of Justice.

In the way of fines, forfeitures of recognizances, fees for affixing seal, &c. (1 Bl. Com. 289.)

5<sup>k</sup>. Profits derived from the King's forests.

1 Bl. Com. 289.

6<sup>k</sup>. Profits derived from *royal fish*, whale and sturgeon.

Grounded on the King's guarding the seas from pirates. (1 Bl. Com. 290.)

7<sup>k</sup>. Profits derived from shipwrecks.

Wreck, by the ancient common law, is where a ship is lost at sea, and the cargo or goods *are thrown upon the land*. The crown succeeded to the goods as *bona vacantia*, if no person (by the laws of Henry I), or no person or animal (by the laws of Henry III), escaped alive; or, at present, if the ownership is not proved within a year and a day. (1 Bl. Com. 291-'2.) The Crown, by the common law, and doubtless the Commonwealth of Virginia, succeeds to all *bona vacantia*. (1 Bl. Com. 298-'9; Bract. L. I. c 12.);

W. C.

1<sup>l</sup>. A proper Wreck at Common Law.

Goods *thrown on the land*, from a ship lost at sea. (1 Bl. Com. 292.)

2<sup>l</sup>. *Jetsam*, *flotsam* and *ligan*; W. C.

1<sup>m</sup>. Jetsam.

Where goods are cast in the sea and *sink*. (1 Bl. Com. 292.)

2<sup>m</sup>. Flotsam.

Where the goods continue to *swim on the surface*. (1 Bl. Com. 292.)

3<sup>m</sup>. Ligan.

Where the goods are sunk in the sea but are *tied to a buoy*, so as to be found. (1 Bl. Com. 292.)

3<sup>l</sup>. Modern provisions touching wrecks ;

W. C.

1<sup>m</sup>. Salvage.

A reasonable reward provided for those who rescue ships and goods wrecked or in danger. (1 Bl. Com. 293.)

2<sup>m</sup>. Provision to assist vessels in distress, (by the peace-officers on shore), and to punish such as endanger or destroy them.

1 Bl. Com. 293-'4; V. C. 1873, c. 90, § 1, & seq.

8<sup>k</sup>. Profits derived from mines of gold and silver.

1 Bl. Com. 294.

9<sup>k</sup>. Profits derived from *treasure-trove*.

That is from *treasure found*, the owner being unknown. (*Fr. trover*, to find). (1 Bl. Com. 295.)

10<sup>k</sup>. Profits derived from *Waifs*, (*bona waviata*).

That is from goods *waived*, or thrown away by a thief in his flight, the owner being unknown. (1 Bl. Com. 296-'7.)

11<sup>k</sup>. Profits derived from *Estrays*.

That is from valuable animals found astray, and wandering, the owner being unknown. (1 Bl. Com. 297; V. C. 1873, c. 98, § 1, & seq.)

12<sup>k</sup>. Profits derived from goods and lands confiscated or forfeited for crime, including *Deodands*.

1 Bl. Com. 299, & seq.

13<sup>k</sup>. Profits arising from Escheats of lands, for defect of heirs.

1 Bl. Com. 302.

14<sup>k</sup>. Profits arising from the custody of Idiots and Lunatics; W. C.1<sup>l</sup>. The case of an Idiot.

An idiot is one that hath no understanding from his nativity, and who is therefore by law presumed never likely to attain any. The fact is to be ascertained upon a writ *de idiota inquirendo*, by a jury of twelve men; and upon its being so proved, (which is rarely done,) the crown is entitled to the profits of his lands, and the custody (and conse-

quent maintenance) of his person. (1 Bl. Com. 342-3.)

2<sup>d</sup>. The case of a Lunatic.

A lunatic is one who has had understanding, but by disease, grief, or other accident, has lost the use of his reason, which yet the law presumes that he may recover. The fact of lunacy is ascertained by a *commission* issued by the Chancellor (to whom, by special authority from the King, the custody of idiots and lunatics is entrusted), and thereupon provision is made for the sustentation and care of the lunatic's person, and the management of his estate, subject to accountability for the net profits, to the lunatic, or his heirs, &c. (1 Bl. Com. 304 & seq; V. C. 1873, c. 82, § 14 & seq; 43 & seq.)

2<sup>d</sup>. The King's Extraordinary Revenue.

Derived from aids, subsidies, or supplies, granted by the representatives of the people, assembled in Parliament. (1 Bl. Com. 306 & seq.)

W. C.

1<sup>st</sup>. The ancient modes of Taxation.

1 Bl. Com. 308 & seq;

W. C.

1<sup>st</sup>. Tenths and fifteenths.

That is tenths and fifteenths of *all the movables* belonging to the subject, at first according to new assessments made at every fresh grant, but in 8 Edw. III, (A. D. 1315), reduced to a certainty, namely, about £29,000 for the whole kingdom. (1 Bl. Com. 308-9.)

2<sup>d</sup>. Scutages.

That is a pecuniary compensation for the military services, at first being arbitrary compositions as the King and subject could agree, which, leading to great abuses, King John was obliged to promise in his *Magna Charta* (Art. XIV, 1 Rap. 287, B. VIII), that no scutage should be imposed without the consent of the Common Council of the realm; which, though omitted in 9 Hen. III, was restored by 25 Edw. I, c. 5 and 6; 34 Edw. I, St. 4, c. 1; and 14 Edw. III, St. 2, c. 1, and extended to the prohibition of *any* aid, task, tallage or tax, but by the common consent of the great men and commons in parliament. (1 Bl. Com. 309-10.)

3<sup>d</sup>. *Hydage*, upon all other Lands than those held in chivalry, and *Tallage* upon cities and boroughs.

1 Bl. Com. 310.

*Hydage* or hidage is an extraordinary tax, payable for every *hyde* or hide (about 100 acres) of land. Otherwise called *hidegild*. (Burr. L. Dict, *in verb.*)

*Talliage*, or more properly *tallage*, (from French *tailler*, to cut), is a *share* of a man's substance, paid by way of tribute, toll, or tax, so that it includes all taxes and burdens set upon the subject, and was anciently called in English a *cutting*. (Burr. L. Dict. *in verbo.*)

4<sup>k</sup>. Subsidies.

Introduced *temp.* Richard II, and Henry IV (A. D. 1377 to 1413). A tax not immediately imposed on property, but upon persons, in respect of their *reputed* estates, according to an ancient and very moderate valuation, however, insomuch that one subsidy according to Sir Edw. Coke, amounted to no more than £70,000. (1 Bl. Com. 310, & seq.)

5<sup>k</sup>. Ecclesiastical Subsidies.

Granted by the clergy in *Convocation*, and confirmed by parliament, or else illegal. Amounted to about £2,000.

The last subsidy granted by clergy or laity was in 15 Car. II, A. D. 1663). After that the levies on *land* were merged in one tax, known as the *Land-tax*. (1 Bl. Com. 311, & seq.)

2<sup>l</sup>. The modern modes of Taxation.

1 Bl. Com. 312-'13, & n (29) & n (30); 2 Steph. Com. 574 & seq;  
W. C.

1<sup>k</sup>. The Land-tax.

The modern substitute for the old charges upon lands. Having prevailed substantially, after 15 Car. II, it was formally recognized by the name of *land-tax*, by Stat. 4 Wm. & M., c. 1, (A. D. 1692). (1 Bl. Com. 312-'13, & n's (29) & (30); 2 Steph. Com. 574.)

2<sup>k</sup>. The Customs,

Or duties, tolls or tributes levied upon merchandise exported and imported. (2 Steph. Com. 575; 1 Bl. Com. 313;)  
W. C.

1<sup>l</sup>. The Authority whereby alone all Customs, whether immemorial or recent, are levied.

The authority of parliament, as insisted by Lord Coke, and expressly acknowledged by Stat. 25 Edw. I, c. 7. (2 Steph. Com. 575; 1 Bl. Com. 313-'14 & n (33).)

2<sup>l</sup>. The etymology of the word *Custom*.



The old Latin is *custuma* (not *consuetudo*, which means usage only). It is derived from the French, *coustum*, or *coutum* (toll or tribute), which comes from *coust* (price, charge or cost). (1 Bl. Com. 314, n (v).)

3<sup>1</sup>. The several Customs levied upon goods in England; W. C.

1<sup>m</sup>. The customs on wool, skins, and leather.

These were very ancient. Conferred indeed by parliament, and subject to its authority, but levied so uninterruptedly, through such a series of reigns, as to have acquired the designation of *hereditary customs of the crown*.

The three commodities named were styled *staple commodities*, because they could only be exported from those ports where the King's *staple* was established. (2 Steph. Com. 575; 1 Bl. Com. 314.)

2<sup>m</sup>. The prisage or butlerage of wines.

*Prisage* was the right of taking two tuns of wine from every ship importing twenty tuns or more. It was called *butlerage*, because having been commuted, by charter Edw. I, for a duty of two shillings a tun imported by "merchant-strangers," it was paid to the King's *butler*. (1 Bl. Com. 314—'15.)

3<sup>m</sup>. Subsidies, Tonnage and Poundage.

Subsidies were duties imposed by parliament, upon the staple commodities alone, (1<sup>m</sup>,) over and above the *custuma antiqua et magna*. (1 Bl. Com. 215; 2 Steph. Com. 576.)

Tonnage was a duty upon all wines imported over and above *prisage and butlerage* (*supra*, 2<sup>m</sup>). (1 Bl. Com. 315; 2 Steph. Com. 576.)

Poundage was an *ad valorem* duty of 12d. in the pound on all merchandise whatsoever. (1 Bl. Com. 315; 2 Steph. Com. 576.)

4<sup>m</sup>. The modern duties levied from time to time by Act of Parliament.

Paid immediately by the merchant, but ultimately by the consumer. The least perceived, and so the the least burdensome of taxes, if laid in moderation, but if excessive, smuggling is encouraged, (which demoralizes the people, whilst it lessens the revenue,) and the cost to the consumer is multiplied by the profit levied by each middle-man upon the duty, as well as the original price. This latter evil is somewhat mitigated by the *warehousing system*, whereby imported goods are kept in public ware-

houses until sold, and *then* the duty is paid. (1 Bl. Com. 317-'18; 2 Steph. Com. 578-'9.)

3<sup>k</sup>. The Excise-duty.

An inland imposition, charged for the most part, on the *manufacturer*, but sometimes on the *consumer*. Unpopular because it leads to domiciliary visits and searches. First introduced (on the model of a Dutch prototype,) by the parliament, in 1643, after the rupture with Charles I, under the auspices of Mr. Pym, the popular leader. The principal articles subject to the excise, are salt, spirits, soap, glass, paper, bricks, hops, sugar, and vinegar. (1 Bl. Com. 313, 318 & seq.; 2 Steph. Com. 579 & seq.)

4<sup>k</sup>. The post office duty for the carriage of letters, &c.

Commenced by James I, with a foreign mail only, extended by Charles I, (A. D., 1635,) to a few of the principal roads in England and Scotland, and finally (in A. D., 1643,) established upon a regular and extended plan, devised by Edmond Prideaux, Attorney-General to the Commonwealth after the execution of King Charles. But since 3 & 4 Vict. c. 96, the consideration of the public convenience has so far prevailed over that of revenue, that the charges have been reduced to an amount so small, as barely to pay the expense of the service. (1 Bl. Com. 321 & seq.; 2 Steph. Com. 582-'3.)

5<sup>k</sup>. The Stamp-duties.

A tax imposed upon all parchment, and paper, whereon any private deeds or other instruments of writing, of almost any nature whatsoever, are written; and upon all newspapers, cards, and dice; to which may be added, as belonging to the same branch of revenue, the duties payable for licenses to keep hackney-carriages, and stage-carriages, or to trade as hawkers and pedlars. Stamp-duties were first instituted by Stat. 5 & 6 W. & M., c. 21. (1 Bl. Com. 323-'4; 2 Steph. Com. 584.)

6<sup>k</sup>. Duties upon articles in the use or keeping of subjects.

Namely, duties on windows, servants, carriages, horses, dogs, hair-powder, armorial bearings, and game-certificates. (2 Steph. Com. 585.)

7<sup>k</sup>. Duties upon offices and pensions.

Consisting in an annual payment (over and above all other duties), out of all salaries, fees and perquisites of offices and pensions, derived from the

crown, exceeding £100 per annum. First imposed by Stat. 31 Geo. II, c. 22. (2 Steph. Com. 586; 1 Bl. Com. 326.)

8<sup>k</sup>. The property and income tax.

Imposed by 5 & 6 Vict., c. 35, purporting to be a temporary expedient. (2 Steph. Com. 586 n (m).)

3<sup>h</sup>. The purposes to which the King's revenue, ordinary and extraordinary, is expected to be applied; W. C.

1<sup>l</sup>. To discharge the annual expenses of the public service.

2<sup>l</sup>. The civil list.

For the expenses of the royal household and establishment, as distinguished from the general exigencies of the State; and in lieu of the proper patrimony of the crown, which has been assigned to the public use. It is usually granted at the commencement of each reign, for the sovereign's life. The amount settled on Queen Victoria is £385,000, of which £60,000 is assigned for her privy purse. (2 Steph. Com. 591; 1 Bl. Com. 331 & seq.)

3<sup>l</sup>. To meet the payments required on account of the national debt; W. C.

1<sup>k</sup>. The unfunded debt.

Comparatively of small amount (about £24,000,000 in 1845), and generally secured by *exchequer-bills*, which are instruments issued at the exchequer, under the authority, for the most part, of acts of parliament passed for the purpose, engaging on the part of the government, to repay the principal sums advanced, with interest. (2 Steph. Com. 586.)

2<sup>k</sup>. The funded debt.

Consisting of annuities granted by parliament to the public creditors, for the most part in perpetuity, affording a certain interest for ever upon the principal sum, to the payment whereof the public faith is pledged. The certificates of these annuities are transferable by the holder, and afford convenient investments, contributing also to interest multitudes of the subjects of the realm in the stability of the government. The funded debt which, when Blackstone wrote, was £136,000,000, was increased in 1842 to £774,000,000, involving an annual expense of £29,000,000. (2 Steph. Com. 587 & seq.)

## CHAPTER IX.

## OF SUBORDINATE MAGISTRATES.

2<sup>e</sup>. Subordinate Magistrates.

Subordinate magistrates do not include the King's principal officers of State, such as the Secretaries of State, &c., because as such they have no important share of magistracy conferred upon them (except that the Secretaries of State may commit offenders for trial); nor the Chancellor, and other judges of the superior courts, because they will find a more proper place elsewhere; nor mayors or aldermen of corporations, because they depend on the charter and franchises of the corporation; but include such as are generally in use, dispersedly, through the kingdom. (1 Bl. Com. 338 & seq.; 3 Steph. Com. 17 & seq.)

The subordinate magistrates now to be treated of are, (1), The sheriff; (2), The coroner; (3), Justices of the peace; (4), Constables; (5), Surveyors of high ways; (6), Overseers of the poor; (7), Escheators; and, (8), Supervisors.

The doctrine touching each of these classes of magistrates will be presented under the heads following, namely: 1, The antiquity and original of the office; 2, The mode of appointment and removal of the incumbent, and modes of securing his fidelity in office; 3, The duties of the office; and 4, The assistants who may be employed.

Let us now consider, in order, the several subordinate magistrates above named:

W. C.

1<sup>st</sup>. The Sheriff.

1 Bl. Com. 339 & seq.; 3 Steph. Com. 21 & seq.; Bac. Abr. Sheriff; 1 Tuck. Com. 45 & seq.;

W. C.

1<sup>st</sup>. The Antiquity, and original of the office of Sheriff.

The office is of great antiquity. The name is derived from the Saxon words *Scire-gerefa*, the *reeve*, or steward of the *shire*. In Latin he is called *vice-comes*, as being the deputy of the earl (*Comes*), to whom the custody of the shire was committed, it is said, at the first division of the kingdom into counties. In process of time, the other engagements of the earl obliged him to devolve the whole of the actual business on the sheriff, who, though still called *vice-comes*, is entirely independent of the earl, the King by his letters-patent committing the care of the county, (*custodiam comitatus*), to the sheriff, and to him alone. (1 Bl. Com. 339.)

2<sup>nd</sup>. The mode of appointment and of removal of sheriffs, and modes of securing fidelity in office; W. C.

1<sup>st</sup>. Mode of appointment and of removal of Sheriffs, and modes of securing fidelity in office, in England; W. C.

bonds required by law, is liable to forfeit from \$100 to \$1,000. (V. C. 1873, c. 12, § 9);

W. C.

1<sup>k</sup>. The Oaths of office.

Va Const. 1869, Art. III, § 6; U. S. Const., Art. VI, § 3; V. C. 1873, c. 12, § 1, 3.

W. C.

1<sup>l</sup>. The Oath to support and maintain the Constitution and laws of the United States, and of Virginia.

2<sup>l</sup>. To recognize and accept the equality of all men before the law.

3<sup>l</sup>. To perform faithfully the duties of the office.

The anti-duelling oath is no longer exacted, but since the adoption of the Constitution (*i. e.*, since 26th day of January, 1870), to fight a duel with a deadly weapon, or to send or accept a challenge within or beyond the limits of Virginia, or knowingly to convey a challenge, or in any manner to aid or assist in fighting a duel, is a disqualification for office, and for the exercise of suffrage. (Const. 1869, Art. III, § 1 (cl. 3); V. C. 1873, c. 11, § 1.)

2<sup>k</sup>. Official Bond.

The county or circuit court is to take from the sheriff bond, with sufficient surety, payable to the Commonwealth of Virginia, in such penalty as the court may deem sufficient, not less than \$20,000, nor more than \$50,000, conditioned for the faithful discharge of the duties of his office. (V. C. 1873, c. 49, § 2, 3; *Id.* c. 12, § 6.)

3<sup>g</sup>. The Duties of Sheriff; W. C.

1<sup>h</sup>. The duties of Sheriff in England.

1 Bl. Com. 343 & seq.; Bac. Abr. Sheriff (L), to (O);

W. C.

1<sup>i</sup>. Judicial Duties of Sheriff in England; W. C.

1<sup>k</sup>. To hear and determine causes of 40 shillings value and under, in his county court.

1 Bl. Com. 343; 3 Steph. Com. 25; Bac. Abr. Sheriff (L).

2<sup>k</sup>. To try issues out of the Superior Courts, in cases of debt or demand, not exceeding £20.

Stat. 3 and 4 Wm. IV, c. 42; 3 Steph Com. 25, n (a).

3<sup>k</sup>. To try in his County Court divers other civil causes; and in his *torn* (or court of view of *frank-pledge*) all *common law* misdemeanors, to a certain extent.

1 Bl. Com. 343; 3 Steph. Com. 25; Bac. Abr. Courts (Sheriff's Torn), (C.) & (D.).

4<sup>k</sup>. In execution of Writs of Partition, and of Admeasurement of Dower.

Bac. Abr. Sheriff (H.), 3; Wroe v. Harris, 2 Wash. 129.

5<sup>k</sup>. As Conservator of the peace.

As the principal conservator of the peace within his county, he may apprehend and commit for breach of the peace, and may take recognizance for keeping it. (1 Bl. Com. 343; Bac. Abr. Sheriff, (L.).)

6<sup>k</sup>. To decide the elections of Knights of the Shire, &c.; to judge of the qualifications of voters, and to return such as he shall determine to be duly elected.

1 Bl. Com. 343; 3 Steph. Com. 25.

In Virginia, five commissioners from among the judges of Election are appointed *annually* by the county and corporation courts, who determine the qualifications of voters. And in case of a tie, elections are decided by lot. (V. C. 1873, ch. 8, § 24.)

2<sup>l</sup>. Ministerial Duties of Sheriff in England; W. C.

1<sup>k</sup>. To act as the Ministerial Officer of the King's Courts.

Thus it is the sheriff's duty to serve the writ summoning the defendant to answer the plaintiff's complaint, and if need be to arrest him, and imprison or take bail; to summon and return the jury; and finally to execute the judgment of the court, &c. (1 Bl. Com. 344; Bac. Abr. Sheriff, (M.).)

2<sup>k</sup>. To act as the King's Bailiff.

In order to preserve the King's rights within his bailiwick or county, by seizing for the crown the lands devolved to it by attainder or escheat; by levying fines and forfeitures; by seizing and keeping waifs, wrecks, estrays and treasure-trove; and by collecting the King's rent. (1 Bl. Com. 344.)

3<sup>k</sup>. To execute Writs of *Ad quod damnum* and *Elegit*.

Bac. Abr. Sheriff, (H.); Wroe v. Harris, 2 Wash. 129; Fulwood's Case, 4 Co. 65, b.

2<sup>h</sup>. The duties of Sheriff in Virginia.

1 Tuck. Com. 46, & seq., B. I.; 1 Bl. Com. 343, & seq.; Bac. Abr. Sheriff, (L.) to (O.);  
W. C.

1<sup>l</sup>. Judicial Duties of Sheriff in Virginia; W. C.

1<sup>k</sup>. In executing Writs of Partition, and of Admeasurement of Dower.

- 1 Tuck. Com. 46, B. I.; Bac. Abr. Sheriff (H.), 3; Wroe v. Harris, 2 Wash. 129.
- 2<sup>k</sup>. As Conservator of the peace.  
*Supra* 5<sup>k</sup>; 1 Bl. Com. 343; Bac. Abr. Sheriff, (L.)
- 2<sup>l</sup>. Ministerial Duties of Sheriff in Virginia; W. C.
- 1<sup>k</sup>. To act as the Ministerial Officer of the Courts of Record.  
*Supra* 1<sup>k</sup>; 1 Bl. Com. 344; Bac. Abr. Sheriff, (M.); 1 Tuck. Com, 46, B. I.; V. C. 1873, ch. 166. § 2, & seq.; Id. ch. 49, § 27, & seq.
- 2<sup>k</sup>. To execute Writs of *Ad quod damnum*, and of *Elegit*.  
 Bac. Abr. Sheriff (H.), 3; Wroe v. Harris, 2 Wash. 129; Fulwood's Case, 4 Co. 65, b; Tillotson v. Cheatham, 2 Johns. (N. Y.) 69.
- 4<sup>g</sup>. The Assistants employed by the Sheriff; W. C.
- 1<sup>h</sup>. Under-sheriffs or Deputies; W. C.
- 1<sup>l</sup>. The mode of Appointment of Deputy-sheriffs in Virginia.  
 The deputy *farms* (that is, *buys*,) the deputation from the sheriff, a proceeding forbidden under heavy penalties in all other cases (V. C. 1873, ch. 11, § 5; Id. ch. 190, § 4, 5); the check being that no deputy can be appointed by the sheriff without being subject to the approval and control of the county or corporation court. (V. C. ch. 11, § 6; Id. ch. 49, § 21; Jacobs v. Commonwealth, 2 Leigh, 709.)
- 2<sup>l</sup>. Guaranties of fidelity in Deputy-sheriffs in Virginia; W. C.
- 1<sup>k</sup>. Oaths of Office of Deputy-sheriff.  
*Ante* p. 94, (1<sup>k</sup>.)
- 2<sup>k</sup>. Official Bond of Deputy-sheriff.  
 The Commonwealth requires no bond of the deputy-sheriff, because the sheriff is answerable *civilly*, for whatsoever default or misconduct the deputy is guilty of *colore officii*. But the sheriff, for his own security, usually requires bond, with sufficient surety, conditioned to indemnify and save him harmless against all loss and damage arising out of the official default or misconduct of the deputy. (Grayd. Forms, 138; Royster v. Leake, 2 Munf. 280; Munford v. Rice, 6 Munf. 81; Jacobs v. Hill, 2 Leigh, 393; Tyree & als v. Wilson, 9 Grat. 59; Tyree & als v. Donnally, Id. 64; Cox & als v. Thomas, Id. 312; Mosby, &c. v. Mosby, Id. 584; Monteith v. Commonwealth, 15 Grat. 172;



Sangster v. Commonwealth, 17 Grat. 124; Ballard v. Thomas, 19 Grat. 14.)

3<sup>d</sup>. Deputy-sheriff's term of Office.

It terminates with that of the principal, and may also be determined before, at the pleasure of the principal, (subject to his responsibility on his contract of deputation, should he do it without cause,) or of the county or corporation court. (V. C. 1873, c. 49, § 22; Hoge v. Trigg, 4 Munf. 154; Montgomery v. Henry, 1 Dall. 49.)

The death of the principal does not (as at common law) determine the deputy's office; but if not removed by the court, nor by the sheriff's personal representatives, he may continue to act in the dead principal's name, until the qualification of a new sheriff. (V. C. 1873, c. 49, § 23.)

4<sup>d</sup>. Duties which a Deputy-sheriff may perform; W. C.

1<sup>st</sup>. Doctrine at Common Law.

The deputy might perform all the duties of sheriff, save only such as are *judicial*, (e. g., a writ of *admeasurement of dower* or of *re-disseisin*,) or such as the sheriff is, by the terms of the writ, required to execute *in person*, (e. g., a writ of *partition*, or of *inquiry of waste*.) (Bac. Abr. Sheriff, (H) 3; 1 Tuck. Com. 48, B. I.)

2<sup>nd</sup>. Doctrine by Statute in Virginia.

The deputy-sheriff, during his continuance in office, may discharge *any of the official duties* of his principal. (V. C. 1873, c. 49, § 21.)

5<sup>d</sup>. Liability of Sheriff for the official acts and defaults of his deputy; W. C.

1<sup>st</sup>. Doctrine at Common Law.

The sheriff is liable *civiliter*, (and in England liable *exclusively*,) for all acts and defaults of his deputy, *colore officii*. Indeed, the sheriff and his deputies are considered as *one officer*. (Saunderson v. Baker, 3 Wils. 309 (S. C. 2 Wm. Bl. 832); Bac. Abr. Sheriff, (H.) 4, (P); James v. McCubbin, 2 Call. 273; Moore's Adm'r v. Dawney & al., 3 H. & M. 132; White v. Johnson, 1 Wash. 160; Hazard v. Israel, 1 Binn. 240; Cameron & als. v. Reynolds, Cowp. 403.)

2<sup>nd</sup>. Doctrine in Virginia, by Statute.

In case of a *return* on process, by an officer, or his deputy, such as entitles any person to *recover money* from such officer *by action*, the person aggrieved may recover it *by motion* against the officer and his sureties, or against the deputy (if the return were



by a deputy) and his. In all other cases, the proceeding can be against the sheriff and his sureties only, and not against the deputy, leaving the sheriff or his sureties to recover of the deputy. (V. C. 1873, c. 49, § 45, 46, 47; 1 Tuck. Com. 48, B. I; Fisher v. Vanmeter, 9 Leigh, 27. But see Richardson v. Perkins, 4 Munf. 512; 3 Rob. Pr. 79; Ramsey v. McCue, 21 Grat. 349.)

But *criminally*, the deputy alone is liable to punishment, (unless it be only a fine or pecuniary penalty,) and not the sheriff, unless he personally concurred in the act. (Lewis' case, 4 Leigh, 664; Bac. Abr. Sheriff, (H.) 4.)

As between the sheriff and his deputy and the latter's sureties, the rule is that a judgment rendered against the sheriff for the deputy's default, in a suit which was defended by the deputy, or which he was duly notified to defend, and had an opportunity of defending, is, in the absence of fraud or collusion, *conclusive evidence*, not only against the deputy, but against his sureties also. (Crawford v. Tuck, 24 Grat. 179 & seq., 186 & seq.; McDaniell v. Brown, 8 Leigh, 118; Scott v. Tankersley, 10 Leigh, 581.)

## 2<sup>h</sup>. Jailors.

The sheriff is in law the jailor, and he is responsible *civilly*, but not *criminally*, for the official conduct of *his deputy*, who has the actual custody of the prison. (V. C. 1873, c. 50, § 6; Dabney v. Taliaferro, 4 Rand. 256; Bailey v. Griffith, 8 Leigh, 442.)

W. C.

## 1<sup>l</sup>. Jailor's duties in Virginia in respect to the comfort and health of prisoners.

The jailor is required to have the jail whitewashed twice a year, and kept properly aired, and clean; to furnish the prisoners wholesome and sufficient food, bed and bedding, and also with fire when needed; to provide nursing and attendance, in case of sickness, and if practicable, a separate apartment; and to exclude the intemperate use of ardent spirits. The observance of these regulations is secured by a quarterly inspection, made by a committee of three persons (one of them a physician), appointed by the county or corporation court, and acting under a peculiarly stringent oath. (V. C. 1873, c. 50, § 3, 4, 5.)

The expense attending the due keeping of the *jail-building* is defrayed by the county (V. C. 1873, c. 50, § 12); that of providing for the prisoners is

defrayed by the party in whose behalf the prisoner is confined; that is, if confined at the suit of the Commonwealth, by the State, if at the suit of an individual in a civil cause, by such person, &c. (V. C. 1873, c. 50, § 16 to 19.)

2<sup>1</sup>. Liability of Jailor for escape of prisoners; W. C.

1<sup>2</sup>. Jailor's *Civil* liability for escapes.

The jailor (*i. e.*, the sheriff) is liable civilly, at common law, for the escape of any prisoner confined on civil process, unless it occur by *act of God or of a public enemy*; and although at one time that liability was by statute in Virginia restricted to those cases where it was *expressly found* that the debtor escaped *with the consent*, or through the *negligence* of the officer (1 R. C. 1819, 550, c. 136, § 3), yet that statute having been repealed (V. C. 1873, c. 209, § 1), the common law is thereby restored. (Bac. Abr. Sheriff (H), 5; Id. (P); Johnson v. Macon, 1 Wash. 5; S. C. 4 Call. 367; Insur. Co. of the Valley v. Bailey's Adm'r, 16 Grat. 384; Booth's Case, Id. 529; Stone v. Wilson, 10 Grat. 530.)

2<sup>2</sup>. Jailor's *Criminal* liability for escapes.

This is confined, for the most part, to the jailor himself, not extending to the sheriff, unless he personally participated in it. (Bac. Abr. Sheriff (H), 4; W. C.

1<sup>1</sup>. Jailor's *Criminal* liability for escapes, where the prisoner is in confinement on a charge or conviction of felony, and the escape is *voluntary*.

Jailor is guilty of felony, punished by penitentiary from one to five years. (V. C. 1873, c. 190, § 12; Synops. Crim. Law, 152.)

2<sup>1</sup>. Jailor's Criminal liability for all negligent escapes, and for voluntary escapes, where the prisoner is not confined on a charge or conviction of felony.

Jailor is guilty of a misdemeanor, punished by jail not more than *six months*, and fine not exceeding \$500. (V. C. 1873, c. 190, § 12; Synops. Crim. Law, 152 )

3<sup>1</sup>. Mode whereby Jailor transfers his prisoners to his successor.

By an *indenture* between himself and his successor, or by an entry upon the record of the county or corporation court, containing the names of the prisoners, with the causes of their commitment. (V. C. 1873, c. 50, § 20; Bac. Abr. Sheriff, (I).)

3<sup>2</sup>. Bailiffs; W. C.

1<sup>1</sup>. Bailiffs in England; W. C.

1<sup>h</sup>. Bailiffs of Hundreds.

Appointed by the sheriffs over the several *hundreds* in his county, to collect fines therein, summon juries, serve process, &c. (1 Bl. Com. 345; Bac. Abr. Sheriff (H) 4.)

2<sup>a</sup>. Special Bailiffs.

Appointed by the Sheriff to assist the bailiff of the hundred, or to execute process upon any certain occasion. (1 Bl. Com. 345-'6; Bac. Abr. Sheriff (H.) 4.) Generally required by the sheriff to give a bond to indemnify him, and for that reason styled *bound bailiffs* (*vulgice, bum-bailiffs*). (1 Bl. Com. 346.)

2<sup>l</sup>. Bailiffs in Virginia.

It is supposed that the sheriff may, by special precept, appoint *special bailiffs* in Virginia, to execute process upon any certain occasion. (Bac. Abr. Sheriff (H.) 4.)

4<sup>h</sup>. Posse Comitatus.

By the common law, the sheriff and his officers, and also every other person charged with the execution of writs of process, may summon the *posse comitatus*, or power of the county—that is, such a number of men as are necessary to aid him in executing writs, quelling riots, apprehending offenders, &c.; and all persons over fifteen, not aged or decrepit, are bound to obey his summons, under penalty of *fine and imprisonment*. (Bac. Abr. Sheriff (N.) 2.) And this doctrine is not only affirmed in Virginia, by statute, but provision is made for the sheriff's requiring the commandant of any regiment in the county to call out such portion thereof to aid him as may be sufficient. (V. C. 1873, ch. 49, § 24.)

2<sup>f</sup>. The Coroner

1 Bl. Com. 346, & seq.; 3 Steph. Com. 30; 1 Tuck. Com. 49, & seq.; Bac. Abr. Coroner; W. C.

1<sup>s</sup>. The antiquity and original of the office of Coroner.

The annotator of 1 Chit. Bl. 347, n (23), in order to illustrate the ancient dignity of the coroner's office, cites Chaucer's description of the *Frankleyn*:

“At sessions ther was he lord and sire;  
Ful often time he was Knight of the Shire;  
A Shereve had he been, and a *Coronour*,  
Was no wher swiche a worthy vavasour.”

And then refers to a remark of Selden (Tit. Hon. 2 and 3, § 4), that some copies have it *Coronour*, and others *Contour*; adding, “But the office of an *account-*

*ant* is perfectly inconsistent with the character described." The word *Contour*, however, signifies not an accountant, but a *pleader*—that is, a member of the legal profession, or sergeant at law, which is surely not beneath the dignity of the *Franklein*. (Jac. Law Dict. *Counter*; 3 Th. Co. Lit. 360; 10 Co. Præm. xxxv.)

The coroner's office is of equal antiquity with that of the sheriff, having been ordained, along with the latter, to keep the peace when the earls gave up the wardship of the counties. The coroner (lat. *Coronator*) is so called because he has chiefly to do with pleas of the Crown. Hence the chief justice of the King's bench, is the chief coroner of England, and may execute the office in any part of the realm. But there are also particular coroners in every county in England, usually four, but sometimes six, and in some instances a less number. (1 Bl. Com. 346-'7; Bac. Abr. *Coroner*.)

2<sup>s</sup>. The modes of appointing and removing Coroners; and of securing their fidelity; W. C.

1<sup>a</sup>. The Modes in England; W. C.

1<sup>1</sup>. The mode of appointing Coroners in England.

They have always been, and still are, chosen by all the freeholders in the county court, by virtue of the writ *de coronatore eligendo*, issued out of chancery, and they hold *durante bene placito*. (1 Bl. Com. 347; Bac. Abr. *Coroner* (A.).)

2<sup>1</sup>. Modes of removing Coroners in England.

The office is determined, like that of sheriff, by the death of the incumbent, or by the election of a successor, by virtue of the writ *de coronatore*, &c., which is issued by royal order whenever he neglects his duties, or when, in consequence of being chosen sheriff, or otherwise, he is disabled to perform them. (1 Bl. Com. 348; Bac. Abr. *Coroner*, (H.); 2 Hawk. P. C. c. 9, § 12, 13.)

3<sup>1</sup>. Mode of securing the fidelity of the Coroner, in England.

By his official oath, administered by the sheriff; and by the competent estate which the coroner was anciently required to possess, and for which the county is answerable. (1 Bl. Com. 347; Bac. Abr. *Coroner*, (A.); 2 Hawk. P. C. c. 9, § 6 to 8.)

2<sup>a</sup>. The modes of appointing and removing coroners in Virginia, and of securing their fidelity; W. C.

1<sup>1</sup>. The mode of appointing Coroners in Virginia.

The county or corporation court nominates to the Governor two persons residing in the county or corporation, one of whom the Governor may appoint to

be coroner, to hold office during good behavior; and if an additional coroner be needed, he may be appointed in like manner. (V. C. 1873, ch. 49, § 13.)

2<sup>d</sup>. Mode of removing Coroners in Virginia; W. C.

1<sup>st</sup>. The Causes for removing Coroners.

The same as in case of the sheriff, (*Ante* p. 93, 1<sup>st</sup>.)

2<sup>nd</sup>. The mode of proceeding to remove Coroners.

The same as in case of sheriff, (*Ante* p. 93, 2<sup>nd</sup>.)

3<sup>d</sup>. Mode of securing the fidelity of Coroners in Virginia; W. C.

1<sup>st</sup>. The oaths of office.

The same as in case of the sheriff, (*Ante* p. 94, 1<sup>st</sup>.)

2<sup>nd</sup>. The Official Bond.

No bond seems required of the coroner, unless he is called on to act as the sheriff's substitute, in which case alone he has any concern with the money or property of others. The statute enacts that before he "shall receive any money, or serve any execution, the court of his county or corporation shall take from him a bond in such penalty as it may deem sufficient," payable to the Commonwealth, and conditioned for the faithful discharge of the duties of his office. (V. C. 1860, c. 49, § 21; V. C. 1873, c. 12, § 6.)

The compiler of the Code of 1873 seems not to have exhibited his wonted accuracy in regarding sections 20, 21, 22, and 23, of chapter 49, of the edition of 1860, as substituted by section 23 of the same chapter in the edition of 1873. So much of the latter section as applies to the requirement of a bond appears clearly to relate to those persons who may be by the court *appointed* to act in place of the coroner, and not to the coroner himself, and therefore in no wise supersedes the occasion for retaining section 21 of chapter 49 of the Code of 1860.

3<sup>rd</sup>. The Duties of Coroner; W. C.

1<sup>st</sup>. The Duties of Coroner in England.

1 Bl. Com. 348-'9; Bac. Abr. Coroner, (C); 2 Hawk. P. C. c. 9, § 13 to 56;  
W. C.

1<sup>st</sup>. Judicial Duties of Coroner in England;  
W. C.

1<sup>st</sup>. Within what places the Coroner has jurisdiction.

He has jurisdiction everywhere within the realm, except within the *reign* of the court (there being a special coroner for the King's household), and except between high and low water mark, when the tide is up, for it is then a part of the open sea, and is

under the jurisdiction of the Admiralty. But he has no jurisdiction over the *open sea*, which designation includes such bays and inlets as are too wide to enable one standing on one side to see distinctly what is done on the other. (Bac Abr. Coroner, (B); 2 Hawk. P. C. c. 9, § 14, 15, &c.)

2<sup>k</sup>. Cases to which the Coroner's cognizance extends in England; W. C.

1<sup>l</sup>. When any are slain, drowned, or suddenly dead or wounded, or die in prison.

1 Bl. Com. 348; Bac. Abr. Coroner, (C); 2 Hawk. P. C. c. 9, § 19.)

2<sup>l</sup>. In cases of *treasure-trove*.

1 Bl. Com. 349; Bac. Abr. Coroner, (C).

3<sup>l</sup>. In cases of wrecks of the sea.

1 Bl. Com. 349; Bac. Abr. Coroner, (C).

4<sup>l</sup>. In cases of outlawry.

To pronounce sentence of outlawry, when the party has been five times exacted from county court to county court, without being arrested. (Bac. Abr. Outlawry, (E), 4; 1 Hawk. P. C. c. 48, § 26 & seq.) *Quære*, if he does not act here-in *ministerially*? (3 Bl. Com. 283; Synops. Crim. L. 230.)

3<sup>k</sup>. Proceedings of Coroner in England, when acting judicially.

He conducts his inquiry by means of a jury of four, five, or six men, who, on an inquiry of death, must be *sworn* by him *super visum corporis*, and not otherwise; but they may then be adjourned to a convenient place. In default of the coroner's acting, a justice of the peace may take the inquisition, which must always be *in public*, subject, however, to the judicial discretion of the coroner. (Bac. Abr. Coroner, (C); 2 Hawk. P. C. c. 9, § 19 & seq.)

2<sup>l</sup>. The ministerial duties of Coroner in England.

He acts ministerially, merely as the sheriff's substitute, to execute process where the sheriff is a party or otherwise so interested pecuniarily, or by partiality in respect to either party, as to disqualify him to act. (1 Bl. Com. 349; Bac. Abr. Coroner, (C) and (F).)

2<sup>h</sup>. Duties of Coroner in Virginia; W. C.

1<sup>l</sup>. Judicial Duties of Coroner in Virginia; W. C.

1<sup>k</sup>. Places within which the Coroner has jurisdiction.

Everywhere within the Commonwealth, except in forts, dock-yards, &c., subject to the exclusive jurisdiction of the United States, (U. S. Const. Art. I, § viii, 17), and except between high and

low water mark, when the *tide is in*. When the *tide is out*, he has jurisdiction over that space, as he has also over such navigable waters as are *infra corpus comitatus*, within the body of some county. But he has no jurisdiction over the *open sea*, over which the admiralty courts (United States) alone have cognizance. (Bac. Abr. Coroner, (C); 2 Hawk. P. C., c. 9, § 14, 15 &c.)

2<sup>k</sup>. Cases to which the Coroner's cognizance extends in Virginia.

It exists where a death is "*supposed to have been caused by violence, and not by casualty*," to enquire when and by what means deceased came to his death. (V. C. 1873 c. 197, § 1; Crim. Synops. 207.)

3<sup>k</sup>. Proceeding by Coroner, when acting *judicially*, in Virginia.

"Upon notice of a death supposed to have been caused *by violence, and not by casualty*," he is required to issue a warrant to the sheriff or sergeant, or to any constable of his county or corporation, to summon six jurors to attend at a place and time named, "to enquire upon the view of the body of ——— there lying dead, when, how, and by what means, he came by his death." If the six jurors do not attend, the officer, or any other person may be required to summon others. An oath is administered by the coroner, who may also summon witnesses, including physicians, and the evidence is reduced to writing. If the jury, by their inquisition, accuse any one, the coroner is forthwith to commit him to jail, if present, and if not present, is to cause him to be arrested, and brought before a justice of the peace for commitment. If there be no coroner at hand, or he fails to perform his duty, a justice of the peace may act.

The jurors are to be *sworn* by the coroner, *super visum corporis*, and not otherwise, but they may then be adjourned to a convenient place. Hence, if the body cannot be found, or the remains are too much decomposed to afford any aid to the enquiry, the coroner has no jurisdiction.

The proceeding must always be *in public*, subject to the usual judicial discretion in the coroner; and although at common law, it could not take place on *Sunday*, (which is *dies non juridicus*), yet in Virginia, it may. (V. C., 1873, c. 197, § 1 &



seq.; Acts 1874-'75, p. 435, c. 349; Bac. Abr. Coroner (C); 2 Hawk. P. C, c. 9, § 19 & seq.; 3 Th. Co. Lit. 345, and n (B) & (D); Id. 356; Hill's case, 2 Grat. 612; Michie v. Michie, 17 Grat. 112.)

2<sup>1</sup>. Ministerial Duties of Coroner in Virginia.

These duties belong to him only as the sheriff's or sergeant's substitute, when there is no sheriff or sergeant, or deputy of either; or when for any cause it is not fit that a sheriff or sergeant should serve process, or summon a jury. And if there is no coroner, or he too is interested, it may be done by a constable, or the court may appoint a crier to act, instead of either coroner or constable. (V. C. 1860, c. 49, § 22, 23; V. C. 1873, c. 49, § 23.)

4<sup>s</sup>. Assistants whom Coroner may employ.

From the silence of the English books, and from the fact that most of the coroner's duties are *judicial*, there would seem to have been *no deputy coroner* at common law. In Virginia, one might for a time have been appointed by the coroner, with the sanction of the county or corporation court; (V. C. 1860, c. 49, § 15); but that provision is repealed. (V. C. 1873, c. 49, § 21, note\*.)

3<sup>f</sup>. Justices of the Peace; W. C.

1<sup>s</sup>. The Antiquity and Original of Justices of the Peace; W. C.

1<sup>h</sup>. The Antiquity and Original of Justices of the Peace in England.

The *office* originated at common law, but the persons holding it were merely *conservators of the peace*, and were styled *custodes pacis*. They were elected by the freeholders, in full county court.

By 1 Ed. III, c. 16, in order to prevent disturbances consequent on the murder of Ed. II, the appointment was transferred to *the king*; by subsequent statutes of the same reign, they were clothed with the power, at sessions, to *take indictments*, and to *hear and determine misdemeanors and felonies*; and by 34 Ed. III, c. 1, received the appellation of *Justices*.

Their commission, which is under the great seal, (1), appoints them all, jointly and severally, to keep the peace, by arresting, binding over, &c.; and (2), any two or more to enquire of and determine felonies and misdemeanors, with a *proviso* that some particular justices by name should always be present (*quorum aliquem vestrum A, B, C, D, &c., unum esse volumus*); whence the justices so named (who at first were only



those most eminent for skill and discretion), are said to be of the *quorum*. (1 Bl. 349 & seq.; Bac. Abr. Justices (A), (B) and (C).)

2<sup>h</sup>. Antiquity and Original of the office of Justice of the Peace in Virginia.

At one of the first regular General Assemblies ever held in Virginia (A. D. 1623), courts were directed to be kept once a month in the *corporations* of Charles City and Elizabeth City counties, to decide controversies not exceeding in value 100 *pounds of tobacco*, and to punish petty offences, the judges being the *commanders* of *plantations* (*i. e.*, settlements), and such others as the governor and council should unite in commission with them, with an appeal to the governor and council. (1 Hen. Stats. 125, 133.)

In 1631, "*Commissioners*" were named to hold monthly courts, not only for the former counties of Charles City and Elizabeth City, but also for those of "Henrico, Warwicke River, Warrosquyoake, and Accawmacke," with jurisdiction of suits not exceeding the value of £5 sterling, and of petty offences, and the same power as justices of the peace in England. (1 Hen. Stats. 168-'9.)

In 1642, Commissioners were directed to hold "*County courts*" in the counties above named, and "James City, Isle of Wight (Warrosquyoake was changed to Isle of Wight in 1637, 1 Hen. Stats. 577), Upper Norfolk, Lower Norfolk, York and Northampton," with a jurisdiction limited to 1,600 pounds of tobacco, and an individual cognizance to the commissioners, under the value of 20 shillings sterling, or 200 pounds of tobacco. (1 Hen. Stats. 272-'3.)

They were not called *Justices of the Peace* until 1661-'2. (3 Hen. Stats. 89.)

Upon the occurrence of the revolution in 1776, it was provided that justices of the peace should be appointed by the governor and council, upon the recommendation of the county court; and so it remained until the Constitution of 1851, which made them *elective by the people*, as they still are. (Va. Const. 1869, Art. VII, § 2.)

2<sup>g</sup>. The Mode of Appointment and of Removal of Justices of the Peace, and also of securing their fidelity; W. C.

1<sup>h</sup>. Mode of Appointment and of Removal of Justices of the Peace in England, and of securing their fidelity; W. C.

1<sup>i</sup>. Mode of *Appointment* of Justices of the Peace in England.

By the Royal Commission, under the great seal.  
(1 Bl. Com. 351; 3 Steph. Com. 39 & seq.)

2<sup>i</sup>. Mode of *Removal* of Justices of the Peace in England; W. C.

1<sup>k</sup>. By the demise of the Crown, or by any manifestation of the King's pleasure.

1 Bl. Com. 353; 3 Steph. Com. 42.

2<sup>k</sup>. Acceptance of an incompatible office.

*e. g.* that of sheriff, &c. (1 Bl. Com. 353.)

3<sup>k</sup>. Non-user, Mis-user, &c.

Bac. Abr. Offices, (M.)

3<sup>i</sup>. Security for *fidelity in office*, of justices in England.

The oath of office, and the possession of an *estate in lands of at least £100 annual value*. (1 Bl. Com. 352-'3; Bac. Abr. Justice, (D).)

2<sup>h</sup>. Mode of *appointment* and of *removal*, of justices of the peace in Virginia, and also of *securing their fidelity*; W. C.

1<sup>i</sup>. Mode of *appointment* of justices of the peace in Virginia.

Every county is divided into as many compactly located magisterial districts as may be necessary, not less than three, and after three have been formed, containing not less than thirty square miles, each district to have a certain name by which it may sue and be sued. Three justices are elected in each district by the voters thereof, to serve two years. (Va. Const. 1869, Art. VII, § 2; Amendment 1874.)

The mayor, recorder and aldermen of *every incorporated town*, and the mayor, members of the council, and trustees in towns with a population under 5,000, have also the power of justices of the peace. (V. C. 1873, c. 48, § 13.)

2<sup>i</sup>. Mode of *removal* of justices in Virginia; W. C.

1<sup>k</sup>. Causes of *removal* from office, of justices.

The same causes as for the removal of sheriff. (*Ante* p. 93, 1<sup>k</sup>; Sherrard's case, 4 Leigh, 643; Tate's case, 3 Leigh, 802; Chew v. Spottsylvania Justices, 2 Va. Cas. 208; Poulson v. Accomac Justices, 2 Leigh, 743; Fugate's case, 2 Leigh, 724; Mann's case, 1 Va. Cas. 138; Alexander's case, Id. 156; Synopsis Crim. Law, 145 to 148.)

2<sup>k</sup>. Mode of proceeding in order to remove justices from office.

The same as in case of sheriff. (*Ante* p. 93, 2<sup>k</sup>)

3<sup>d</sup>. Modes in Virginia of *securing fidelity* in office, of justices of the peace.

The oaths of office. These are the same as in the case of sheriff, (*ante* p. 94, 1<sup>a</sup>), and to act before taking them, subjects the offender to a forfeiture of from \$100 to 1000. (V. C. 1873, c. 12, § 9, 5.)

3<sup>s</sup>. The Duties of the justice of the peace; W. C.

1<sup>a</sup>. The Duties of a justice of the peace in England.

The duties of a justice of the peace in England are believed to be properly *judicial* in all cases, although *it is said* he acts only *ministerially* in preserving the peace, and in causing malefactors to be apprehended, and their appearance secured. And certain it is that a justice is not liable to a *private action* for any wrong that he may commit, even maliciously, save in such cases as these, although by leave of court he may be prosecuted *criminally*, as he may also be held answerable *civilly* if he act *corruptly* in those cases where he hears and determines *as a judge*. (1 Bl. Com. 354, & notes; 3 Steph. Com. 43-'4; Bac. Abr. Justices, &c., (E); 5 Burn's Just. 4, 31, 129 &c.; 1 Chit. Gen. Pr. 128; 2 Hawk. P. C: c. 8 § 74; Id. c. 13, § 20.)

2<sup>a</sup>. The Duties of a justice of the peace in Virginia.

The duties of a justice of the peace in Virginia are also principally, if not exclusively *judicial*, but subject to the qualification noted (*supra* 1<sup>a</sup>), as existing in England, and also to certain other qualifications named *infra*, under 7<sup>d</sup>, 8<sup>d</sup>, and 9<sup>d</sup>. They act always *singly*, (save only in certifying acknowledgments, &c., of married women), although the acting justice may call others to his aid as his advisers, but the *action* is *his*. W. C.

1<sup>d</sup>. To keep the peace.

And therefore to bind over by recognizance such as threaten to break it, to suppress riots, &c., as at common law, at least substantially. (V. C. 1873, ch. 196, § 1, & seq.; Id. ch. 205, § 4 to 13; Synops. Crim. L. 204, & seq.)

2<sup>d</sup>. To issue warrants, to *arrest and commit felons*, and other lesser offenders, or bind them in recognizance to answer.

V. C. 1873, ch. 199, § 1, & seq.; Synops. Crim. L. 214, & seq.

3<sup>d</sup>. To issue warrants to search for things stolen, counterfeit coin, &c.; obscene books, &c.; lottery tickets, &c., or gaming apparatus; and to arrest the offenders.

V. C. 1873, ch. 198, § 1, &c.; Synops. Crim. L. 217-'18.

4<sup>1</sup>. To act in place of the Coroner in holding inquests.  
V. C. 1873, ch. 197, § 11.

5<sup>1</sup>. To try, in a summary way, such minor offences as are punished only by fine which *cannot exceed* \$20; or cases of assault and battery not felonious; or cases of petit larceny.

V. C. 1873, ch. 40, § 1, 2, 3; Id. ch. 147, § 1; Id. ch. 48, § 8, 9; Synops. Crim. L. 210, & seq.

6<sup>1</sup>. To try civil causes of small value.

Where the claim is to property (*i. e.*, *personal property*), or to a *debt or other money*, not of greater value or amount than \$50 (exclusive of interest), or if defendant object, not greater than \$20; or in case of trespass on lands by cattle; or in cases of unlawful detainer by tenants for terms not originally exceeding one month. (V. C. 1873, ch. 147, § 1; Id. ch. 97, § 18; Id. ch. 130, § 1; *Miller v. Marshall*, 1 Va. Cas. 158; *Warwick & al. v. Mayo, Mayor, &c.*, 15 Grat. 541 to 543.)

7<sup>1</sup>. To issue warrants, upon application of an overseer of the poor, to remove a pauper, &c.

V. C. ch. 51, § 16.

The duties specified under heads 7<sup>1</sup>, 8<sup>1</sup> and 9<sup>1</sup> are considered *ministerial*. The others are deemed judicial.

8<sup>1</sup>. To take and certify acknowledgments of conveyances, &c., for registry, and also affidavits and depositions.

V. C. 1873, ch. 117, § 3; Id. ch. 48, § 5; Id. 172, § 29.

9<sup>1</sup>. To take and certify (*two together*) the privy examination and acknowledgment of a married woman.

V. C. 1873, ch. 117, § 4.

4<sup>2</sup>. Constables; W. C.

1<sup>a</sup>. The antiquity and original of the office of Constable; W. C.

1<sup>b</sup>. the antiquity and original of the office of Constable in England.

There are various officers so called—namely, the Lord High Constable of England (now extinct), the Constable of the Hundred, sometimes styled *High Constable*, and the constable of the *ville*, township or manor, generally called *petty constable*. The name, which was first bestowed upon the most eminent, is said to be derived from the Latin, *comes stabuli*, because the Lord High Constable of England was leader of the King's armies, and had cognizance of whatever pertained to arms, war, or *knighthood*.

The other two classes of constables are very ancient, more ancient perhaps than the Conquest, according to Lord Coke, going back (under the designation of *head-borough*, *boroughs-ealder*, or *borsholder*), to the *institution of the frank-pledge* by Alfred. No mention, however, of such an officer as *constable*, at least by that name, occurs earlier than 36 Hen. III (A. D. 1252), when a writ is preserved providing for the appointment of a *chief constable* in every hundred, and in every township, ville, or village, a *petty constable* or two, according to the number of the inhabitants, for the *conservation of the King's peace*. (1 Bl. Com. 355, &c.; Bac. Abr. Constable (A.); Jac. Law Dict. Constable; 2 Hawk. P. C. c. 10, § 33-'4; 1 Burns' Just. 644.)

2<sup>h</sup>. The antiquity and original of the office of Constable in Virginia.

Constables were recognized by the statutes of Virginia so early as 1643 (when they seem to have been already well known officers), being required to present to the "commissioners of the monthly courts," such as failed to plant two acres of corn for each laboring person. (1 Hen. Stats. 246.) Various other acts previous to the revolution imposed sundry duties upon them, besides their principal common law duty as conservators of the peace; *e. g.*, by act of 1730, to see to the destruction of *tobacco suckers*, in order to improve the staple of tobacco (4 Hen. Stats. 242); by act of 1748, to suppress unlawful meetings of slaves (5 Hen. Stats. 109); and by act of 1755, to convey deserters to the commands where they belong (6 Hen. Stats. 563).

By the Constitution of 1776, (Art. 15,) constables were directed to be "appointed by the justices," which seems to have been the usage from the beginning, without the aid of any statute, by analogy to the sheriff's *tourn* or *leet* in England. (Hen. Just. 245.) And they continued to be appointed by the justices, (*i. e.*, the county and corporation courts,) until by the Constitution of 1851, (Art. VI, § 30,) in an evil hour, they were ordered to be *elected by the voters* in the several magisterial districts, as they also are by the Constitution of 1869, (Art. VII, § 2.)

2<sup>g</sup>. Mode of appointment and removal of Constables, and of securing their fidelity; W. C.

1<sup>h</sup>. Mode of appointment, and of removal of Constables, and of securing their fidelity in England; W. C.

1<sup>i</sup>. Mode of *appointment* of Constables in England.

High, or *chief constables* of hundreds, are appointed, it would seem, by the sheriff's *tourn*, or in default of that, by the justices at their *special sessions* for the several divisions of the county. (2 Hawk. P. C. c. 10, § 37; 1 Bl. Com. 355; 3 Steph. Com. 47.)

*Petty constables* of *villes*, &c., were formerly chosen by the jury at the court-leet for the *decennary* or *tithing*, or if no court-leet be held, by *two justices*; but by 5 and 6 Vict. c. 109, the appointment is made in all cases by the justices, at *special sessions*. (1 Bl. Com. 356; 3 Steph. Com. 48-'9.)

2<sup>i</sup>. Mode of *removal* of Constables in England.

At common law a chief constable was removable by the sheriff, as the judge of *tourn*, and a petty constable by the steward, as judge of the *court-leet*. By statute 5 and 6 Vict. c. 109, the petty constable continues in office *a year*, and until his successor is appointed, and it would seem is removable by the *special sessions*. Both classes may doubtless be removed for the same causes as sheriffs in Virginia, (*ante* p. 93, 2<sup>k</sup>.) (2 Hawk. P. C. c. 10, § 38; 3 Steph. Com. 49.)

3<sup>i</sup>. Mode of *securing fidelity* of Constables in England.

By oath of office, which now defines pretty clearly the constable's duty. (3 Steph. Com. 49; 1 Burn's Just. 653.)

2<sup>h</sup>. Mode of appointment, and of removal of Constables, and of securing their fidelity in Virginia; W. C.1<sup>i</sup>. Mode of *appointment* of Constables in Virginia.

A constable is elected by the voters in each magisterial district, on the fourth Thursday in May, to serve *two years* from first of July ensuing. (Va. Const. 1869, Art. VII, § 2; Amendments 1874.)

2<sup>i</sup>. Mode of *removal* of Constables in Virginia.

The causes and modes of removal are the same as in case of sheriffs, (*ante* p. 93, 1<sup>k</sup>, 2<sup>k</sup>) (V. C. 1873, c. 49, § 15.)

3<sup>i</sup>. Modes of *securing fidelity* of Constables in Virginia. W. C.1<sup>k</sup>. The Oaths of Office.

The same as in case of the sheriff, (*ante* p. 94; V. C. 1873, c. 12, § 1.)

2<sup>k</sup>. Official bond.

To be executed when constable qualifies by taking the oaths before the judge of the circuit or county court of his county (or in a corporation, before the city judge), in term time or vacation, in a penalty of not less than \$2,000, with surety deemed

sufficient by the court or judge, payable to the Commonwealth of Virginia, and recorded in the county (or city?) court. (V. C. 1873, c. 49, § 16; Id. c. 13, § 6.)

3<sup>s</sup>. The Duties of a Constable; W. C.

1<sup>h</sup>. The Duties of a Constable in England.

To *keep the peace* within his district, for which purpose he is armed with large powers of arresting and imprisoning, &c.; to present at the *tourn* or *leet*, all persons guilty of offences inquirable therein; and to be the *ministerial officer* of the justices of the peace. He is said to have power to appoint a deputy in case of necessity (his duty being wholly *ministerial*), although it can seldom be needful, as a justice may, if occasion require, appoint a special constable. (1 Bl. Com. 356; Bac. Abr. Constable (C) & (D); 2 Hawk. P. C., c. 10, § 34 to 36, 49 & n (4).)

2<sup>h</sup>. The duties of a Constable in Virginia; W. C.

1<sup>i</sup>. As *conservator* of the peace.

He is empowered, by virtue of his common law authority, to keep the peace, and may exercise for that purpose the same powers as at common law, unless forbidden by statute. It is furthermore his duty, as well as that of the sheriff and other officers, to give information of the violation of any penal law, to the attorney for the Commonwealth, in order that proceedings may be instituted. (1 Bl. Com. 356; Bac. Abr. Constable (C); 2 Hawk. P. C., c. 10, § 34; V. C. 1873, c. 161, § 8.)

Sergeants of corporate towns, whose population is under 5,000, and which have a mayor and council, or board of trustees, have the powers of constables. (V. C. 1873, c. 49, § 8.)

2<sup>i</sup>. As *ministerial officer* of justices of the peace, or of the coroner.

*e. g.*, In serving summons (V. C. 1873, c. 147, § 2), subpoenas (Id. § 3), executions (Id. § 9), writs of interpleader (Id. § 14), attachments (Id. c. 148, § 6), distress-warrants (Id. c. 134, § 10), arrests on criminal charges (Id. 199, § 2, &c.), arrests upon demand of surety of peace, &c. (V. C. c. 196, § 2, 3, & seq.), search-warrants (Id. c. 198, § 1, 3), coroner's juries of inquest (Id. 197, § 1) Bac. Abr. Constable (D); 2 Hawk. P. C., c. 10, § 35; 1 Burn's Just. 659, & seq.)

5<sup>t</sup>. Surveyors of Highways; W. C.

The doctrine relating to surveyors of highways may be arranged under the heads following, namely: (1), The antiquity and original of the office; (2), The mode



of appointment and removal, and of securing the fidelity of surveyors; (3), The duties of surveyors; (4,) The establishing or altering of roads or landings; (5), The building of bridges or causeways; (6), The discontinuing of roads and landings;

1<sup>s</sup>. Antiquity and original of the office of Surveyor of Highways; W. C.

1<sup>h</sup>. Antiquity and original of the office of Surveyor of Highways in England.

By the common law, *the parish* was bound to keep the *highways* within its limits in repair, whilst *bridges* were built and repaired at the expense of *the county*. But although the parish was and is liable to indictment for neglect of its duty in this respect, it was not incumbent on the church-wardens, nor on any particular officer, to call the parish together, and set them to work, until 2 & 3 Ph. & Mary required surveyors of highways to be chosen for every parish by the constable and church-wardens, their duties being regulated by several subsequent statutes, especially by 5 & 6 Wm. IV, c. 50, and 4 & 5 Vict. c. 51, 59. (1 Bl. Com. 357-'8; 3 Steph. Com. 260-'61; Bac. Abr. Highways (A).)

2<sup>h</sup>. Antiquity and original of the office of Surveyor of Highways in Virginia.

The earliest act touching the opening or care of highways is in 1632. It provides that "*highwaies* shall be *layd* out in such convenient places as are requisite, as the governour and *counsell*, or the commissioners for the *mounthlie corts* shall appoint, according as the parishioners of every parish shall agree." (1 Hen. Stats. 199.) And in 1657 it was enacted that "surveyors of *highwaies*, and maintenance for bridges, be yearly kept and appointed in each *countie* court respectively, and that all general *waies* from county to county, and all church *waies* be *laied* out and *cleered* yearly, as each county court shall think *fitt*, needful, and convenient, respect being had to the course used in *England*, to that end." (1 Hen. Stats. 436.) By act of 1661, the county courts were required annually to appoint surveyors, who, through the vestries of the several parishes, should call out the laboring men to do the work as required by the surveyors. (2 Hen. Stats. 103.) And in 1705, the law took substantially the shape it has since, until recently, retained, the public roads being divided into precincts, to each of which a surveyor was annually assigned by the county court, the labor being supplied from the



male laboring persons that were *tithable*, i. e., such as were over 16. (3 Hen. Stats. 258, 392.)

2<sup>s</sup>. Mode of appointment, and of removal of Surveyors of Highways, and of securing their fidelity; W. C.

1<sup>h</sup>. Mode of appointment and of removal, and of securing the fidelity of Surveyors of Highways in England; W. C.

1<sup>l</sup>. Mode of *appointment* of Surveyors in England.

Surveyors of highways were originally appointed by the constable and church-wardens of the parish, and more recently (by 5 & 6 Wm. IV, c. 50, and 4 & 5 Vict. c. 51, 59), are elected annually, by the inhabitants of the parish, in vestry assembled. (1 Bl. Com. 658; 3 Steph. Com. 261.)

2<sup>l</sup>. Mode of *removal* of Surveyors of Highways in England.

In like manner as sheriffs in Virginia. (*Ante* p. 93, 2<sup>l</sup>.)

3<sup>l</sup>. Mode of *securing fidelity* of Surveyors in England.

It would seem only by the general penalties for official malfeasance and non-feasance. (3 Steph. Com. 262.)

2<sup>h</sup>. Mode of appointment, and of removal of Surveyors of Highways in Virginia, and of securing their fidelity; W. C.

1<sup>l</sup>. Mode of *appointment* of Surveyors of Highways, in Virginia.

The court of each county is required to divide into precincts all the county-roads not kept in order under any contract, and as often as it pleases, may appoint a surveyor for each precinct, who holds his office until another is appointed in his stead; but after two years he may give up his office, if his road be in good order, and cannot be again appointed without his consent, within two years thereafter. (Acts 1874-'75, p. 180, c. 181, § 17, 18.)

The county court, whenever it shall deem it necessary, may appoint one or more freeholders, not exceeding three, as *commissioners* to examine existing roads, and routes for new roads, who shall report to the court as to the expediency of altering old or opening new roads, or of building or repairing any bridge. (Acts 1874-'5, p. 177, c. 181.)

2<sup>l</sup>. Mode of *removal* of Surveyors of Highways in Virginia,

The causes and modes seem to be essentially the same as in case of sheriffs. (*Ante*, p. 93, 1<sup>h</sup>. & 2<sup>h</sup>); but as the county court may remove them at pleasure, the more formal methods will be seldom used.

3<sup>1</sup>. Mode of *securing the fidelity* of Surveyors of Highways in Virginia.

By the oaths of office, as in case of sheriff, (*ante* p. 94, 1<sup>h</sup>); by the penalties for malfeasance and non-feasance, *at common law*, viz.: forfeiture of office and fine; and by the penalty denounced by the statute, namely: a fine of from \$5 to \$30. (Bac. Abr. Offices (N); 1 Th. Co. Lit. 238-'9, & n (I); Acts 1874-'5, p. 183, c. 181, § 28.)

3<sup>2</sup>. Duties of Surveyors of Highways; W. C.

1<sup>h</sup>. Duties of Surveyors of Highways in England.

To keep the highways in repair, to remove obstructions and nuisances, and to set up guide posts, &c. (1 Bl. Com. 358; 3 Steph. Com. 262, &c.)

But in later years, most of the great roads of England have been made, and are kept in repair, under *turnpike acts*, whereby certain commissioners are empowered to construct the road, and to institute tolls in order to re-imburse themselves, and to defray the cost of keeping the roads in good condition. (1 Bl. Com. 359; 3 Steph. Com. 266 & seq.)

2<sup>h</sup>. Duties of Surveyors of Highways in Virginia.

To superintend the roads in his precinct, and to cause them to be kept cleared, smoothed of rocks and obstructions, of the necessary width (usually thirty feet), well drained, and otherwise in good order, and secure from the falling of dead timber; to erect sign boards at the forks and crossings; across every stream, where it is necessary and practicable, to place a bridge, or at least a bench or log, for foot passengers; to construct causeways when needful and practicable; and to keep both bridges and causeways in as good order as the means in his power will permit; to open new roads and landings, and alter old ones; to *collect the road-taxes and fines*; and to render to the county court *annually* an account of his receipts and disbursements. (Acts 1874-'5, p. 180, ch. 181, § 19, &c.);

W. C.

1<sup>1</sup>. Means provided for keeping the public roads in repair, &c.

The means principally relied upon to open new roads and to keep existing ones in repair are the *labor of the country*—that is, of all male persons (with some exceptions) between the ages of sixteen and sixty years. This, to be sure, is, to a trifling extent, eked out by the fines assessed upon delinquents, which are at the rate of seventy-five cents for each day of failure to work when required by the over-

seer. But where the surveyor of any precinct is unable with the means and labor at his disposal to keep the road in good order, he may be authorized by the county court to hire labor for the purpose, and the expense is to be paid out of the county fund. (Acts 1874-'5, p. 181, &c., ch. 181, § 21, & seq.) And the making, improving, or keeping in order any road, or part of a road, may, in the discretion of the court, be let out to contract, the expense being defrayed out of the county levy. (Acts 1874-'5, p. 184, ch. 181, § 33, & seq.)

W. C.

1<sup>k</sup>. Road labor.

All males between sixteen and sixty years, in each road district, are appointed to work on some public road therein, except the residents in towns which provide for their own poor and keep their streets in order, ministers of the gospel and persons disabled. The penalty for failure is seventy-five cents per day, which is to be applied to the roads. (Acts 1874-'5, p. 181, ch. 18, § 21, 22.)

2<sup>k</sup>. Materials needed for roads, &c.

Wood, stone, gravel or earth necessary in constructing or repairing any road, bridge or causeway, may be taken by the overseer from any *convenient* lands, or a ditch for draining the road may be cut through *adjoining* lands (provided it be not a lot in a town, yard or garden); the damage done, if desired, to be estimated by three sworn freeholders, under a warrant from a justice, and included by the board of supervisors in the next county levy. (Acts 1874-'75, p. 182, ch. 181, § 23, & seq.)

3<sup>k</sup>. Accounting by Overseer for fines, and expenses incurred

He must account *annually* to the county court for the fines collected and expended, showing the amount paid in money, and in labor, teams, &c., respectively; and the amount, in his opinion, required to keep his road in order for the ensuing year. And he is entitled to compensation at the discretion of the county court, to be paid out of the county levy, not exceeding one dollar per day for the time actually employed *in summoning hands to work on the road*. (Acts 1874-'75, p. 183, ch. 181, § 23, 27, 28.)

2<sup>l</sup>. Mode of redress, if roads are not kept in repair, &c.

The *overseer* is supposed to be punishable, as at common law, for any neglect of his duty, by fine

and imprisonment (Bac. Abr. Offices (N.); 1 Th. Co. Lit. 238-'9, and n (I, 1); and the statute imposes, for any failure to perform what the law requires from him, a fine of not less than five nor more than thirty dollars. (Acts 1874-'75, p. 183, ch. 181, § 28.)

4<sup>s</sup>. The establishing or altering of roads or landings; W.C.

1<sup>h</sup>. What power may establish or alter roads or landings.

The power belongs to the *county courts*, to be exercised at their *discretion*, or to be called forth by the *application* of individuals. (Acts 1874-'75, p. 177, ch. 181, § 3, & seq.)

2<sup>h</sup>. The method of proceeding to establish or alter a road or landing.

The method, in case of a *landing*, is in general the same as in case of a *road*. For brevity's sake, the statement is applied to *roads only*. (Acts 1874-'75, p. 177, ch. 181, § 3, & seq.)

W. C.

1<sup>i</sup>. Where the whole road is in *one county*; W. C.

1<sup>k</sup>. Preliminary examination by a Commissioner of Roads, or by Viewers, and their report.

The county court, upon its *own motion*, or upon the *application of any person*, may direct one or more commissioners of roads, or three or more *viewers* (who it is said need not be *sworn*), to view the ground and report to the court, the conveniences and inconveniences that will result, as well to individuals as to the public, if such road shall be as proposed, and especially whether it will invade any yard, garden or orchard. The *commissioner* (or the *viewers*) shall, besides these particulars, report also the facts, in his opinion, useful in determining the judgment of the court; compare the route proposed with other routes, with the reasons for preferring either; state the names of the landholders, which of them require compensation, and the probable amount; and return, with his report, a map or diagram of the route, employing a surveyor if necessary. (Acts 1874-'75, p. 177, ch. 181, § 3, 4; Clarke v. Mayo, 4 Call. 374; Fisher v. Smith, 5 Leigh, 611; Crenshaw v. Patterson, 6 Leigh, 457; Lewis v. Washington, 5 Grat. 265; White v. Coleman, 6 Grat. 138; Mitchell v. Thornton, 21 Grat. 164.)

2<sup>k</sup>. Summoning the land-owners to show cause against establishing or altering the road.

Upon this report unless the opinion of the court be adverse to the establishment or alteration of the

road, it shall summon the land-owners concerned, to show cause against it; and then, if the court has enough before it to fix upon a just compensation to them, and they are willing to accept it, it may determine the matter without further proceedings. Otherwise it is to appoint five disinterested freeholders of the county, (any three of whom may act,) for the purpose of ascertaining a just compensation for the lands to be used for the road. (Acts 1874-'5, p. 178, c. 181, § 6, 7.)

3<sup>d</sup>. Tenor of the proceedings by the Commissioners.

The commissioners are to meet on the lands in question, at a certain place and day, to be named in the order of court appointing them, of which the sheriff shall give notice to the land-owners, and after being sworn, shall ascertain, agreeably to V. C. 1873, c. 56, § 9 and 10, what will be a just compensation to each proprietor for his land proposed to be taken, and for the damage to the residue of his tract beyond the *peculiar benefit* which will be derived in respect to such residue from the road; and this inquest, *signed* by the commissioners, the latter must return to the court, along with the certificate of their oath. But if the sum allowed by the commissioners is not more than that previously proposed by the court, the land-owner is to pay the cost occasioned by the order appointing the commissioners. (Acts 1874-'5, p. 178, c. 181, § 78; V. C. 1873, c. 56, § 9, 10; Atto. Gen. v. Turpin, 3 Hen. & M. 448; Jas. Riv. & Ka. Co. v. Turner, 9 Leigh, 313; Muir v. Falconer & als. 10 Grat. 12.)

4<sup>d</sup>. Sentence, or Order of Court.

Upon the report, the report of the commissioners, and other evidence, if any, the court shall determine whether the road shall be established or altered as proposed, or not; and if it determines to establish or alter it, the county is chargeable with the compensation to the proprietors or tenants, with such costs as the court may allow the applicants, and the costs of the commission, except where the sum allowed by the commissioners to any land-owner is not more than the court before appointing the commissioners had consented to allow him, in which case he is adjudged to pay the costs of the commission. (Acts 1874-'5, p. 179, c. 181, § 10, 8.) On the other hand, when the court decides against the application, the applicant is to pay the costs, except the compensation of the commissioner, viewers, and surveyor; and except also the costs of the commissioners in the case

above mentioned, where, in consequence of the sum awarded by the commissioners, not exceeding that which the court had previously consented to allow, the land-owner has to pay the costs of the commission. (Acts 1874-'5, p. 179, c. 181, § 12, 8.)

1<sup>i</sup>. Where the road to be established is *not wholly in one county*.

The court of the one county may notify that of the other that a road is needed from the line of the former county to some place in the latter, and if the court of the latter county concurs, the same proceedings are had as when a person applies to have a road established. If it does not concur, or if either court fail to do its part towards the work, the Circuit court of the county whose court is complained of, at the instance of the court of the other county, shall by *mandamus* compel the delinquent court to do what it ought. (Acts 1874-'5, p. 183, c. 181, § 30 & seq.)

5<sup>g</sup>. The building of Bridges or Causeways.

Small bridges and causeways, which it is practicable for the overseer of a road-precinct to construct or repair with the means at his disposal, are to be constructed and repaired accordingly. But if that be not practicable, the work must be contracted for by commissioners appointed by the county court, and acting under its direction; no contract being valid until it is ratified and approved by the court. The needful charges of such works are included in the county levy. And where the work is necessary "*over a place*" between two counties, it is performed at their common *ratable* expense, in pursuance of an arrangement concurred in by the courts thereof respectively; or if they do not agree, the matter is adjusted by means of a *mandamus* from the Circuit court of the county whose court is recusant. (Acts 1874-'5, p. 183, c. 181, § 29 & seq.)

The mode of making contracts for bridges, roads, &c., is prescribed with minuteness, and is essentially the same in all the cases. One or more commissioners of roads are directed to receive proposals for the work, for which they are to advertise in a newspaper for four weeks, or at the front-door of the court house on a court-day, the proposals to be put in, in writing, on the first day of the *next court*, or some named day *subsequent* thereto. They make the contract, and return it, *with all the proposals*, to the county court; and from the time it is ratified by the court, and a bond with sufficient sureties, to be approved by the court, is given by

the contractor, it is obligatory on the contractor and on the county. (Acts 1874-'5, p. 184, c. 181, § 33 & seq.)

6<sup>s</sup>. The Discontinuing of Roads or Landings.

The county court has power in its discretion to discontinue a county road and landing, after due notice, and after a report *in writing*, from three or more *viewers* or commissioners, whether any, and if any, what convenience would result from the discontinuance. If upon this report and other evidence the court shall think fit to discontinue such road or landing, it must take care, in case it be an established *post-road*, to suspend final action until another has been substituted. (Acts 1874-'5, p. 179, c. 181, § 13; Senter & als v. Pugh, 9 Grat. 260.)

7<sup>s</sup>. Erection of Gates across roads, &c.

Application may be made to a county court, after due notice, to permit gates to be erected across any road therein; but always to be discontinued when the court shall so direct. (Acts 1874-'5, p. 179, c. 181, § 14, 15; Carpenter & als. v. Sims, 3 Leigh, 675.)

8<sup>s</sup>. Extent of right acquired by the public, upon opening a highway.

The public acquires *merely a right of passage*. The *freehold*, and *all the profits* of the soil (*e. g.*, trees, mines, &c.), belong still to the proprietor from whom the right of passage was acquired. He may therefore recover the *freehold* in ejectment, subject to the right of way, and may maintain an action of trespass for digging the ground. If it be unknown from which of two adjacent proprietors a highway was at first taken, or if the highway be the boundary between them, they are understood to own each *ad medium filum viæ*. (Bac. Abr. Highways (B); Bolling v. Mayor of Petersburg, &c., 3 Rand. 563; Home v. Richards, 4 Call, 441; Harris v. Elliott, 10 Pet. 25.)

9<sup>s</sup>. Dedication of Highways to the public.

The long enjoyment of a road by the public as a highway is only one element to justify a presumption of dedication. There must also be an *acceptance* by its accredited officers, as by appointing overseers, or the like. On the other hand, if the public authorities treat a road as a public highway, a comparatively short time will warrant a presumption of dedication on the part of the owner. (Clarke v. Mayo, 4 Call, 374; Holleman v. Com'th, 2 Va. Cas. 135; Sampson v. Goochland Justices, 5 Grat. 251; Kelly's Case, 8 Grat. 632.)

10<sup>s</sup>. Police regulations touching Highways.

To kill a tree and leave it standing within fifty feet



of a road; to injure a bridge, sign-board, or mile-stone; to obstruct a road; to allow one's *mill-dam*, over which a road passes, to be in unsafe condition; to fail to drive seasonably to the right, when meeting or overtaking a vehicle; to drive or ride over a bridge faster than a walk; to be concerned in a horse-race on a public road; to fail in one's duty as a surveyor; all these are misdemeanors punished by fines of various amounts, which, if they *may not* exceed \$20, are recoverable before a justice, otherwise in a court of record. (Acts 1874-'75, p. 180, c. 181, § 16; V. C. 1873, c. 96, § 1 to 4; Id. c. 41, § 1; Synops. Crim. Law, 180-'81.)

6<sup>f</sup>. Overseers of the Poor; W. C.

1<sup>g</sup>. Antiquity and original of the office of Overseer of the Poor; W. C.

1<sup>a</sup>. Antiquity and original of the office of Overseer of the Poor in England;

Until the time of Henry VIII, the poor of England subsisted entirely upon private benevolence, and especially upon the alms of the monasteries, and other religious houses. It is said, indeed, that by the common law the poor were to be sustained by the parson and the parishioners, so that none should die for default of sustenance; but no compulsory method was chalked out for the purpose, until the Stat. 27 Hen. VIII, c. 25, when the total dissolution of the monasteries made some legal and coercive provision indispensable. During the reign of Henry VIII, and his children, the legal system of maintaining the poor was not a little improved by the erection of hospitals for the impotent, and work-houses for the vigorous and idle, and at length, by 43 Eliz. c. 2, *overseers of the poor* were provided for every parish. (1 Bl. Com. 359-'60.)

2<sup>b</sup>. Antiquity and original of the Overseer of the Poor in Virginia.

No statute containing a compulsory provision for the poor seems to have been enacted in Virginia until 1720, save only that *poor children* were ordered to be *bound out*, in some instances. The *church-wardens*, and not overseers of the poor, were at first charged with the system. The provisions closely resembled those of our existing statutes, especially as respects a *settlement*, and the treatment of *vagabonds*. (4 Hen. Stats. 208 & seq.; 1 Do. 336.)

The subject remained in the hands of the church-wardens and vestries until the dissolution of the church establishment in 1779, when *overseers of the poor* were directed, by act of May, 1780 (10 Hen. Stats. 288), to



be chosen in certain counties, a provision which, in 1782, was extended to certain other counties (11 Hen. Stats. 62, &c.), and in 1785 to the whole Commonwealth, the counties being laid off into districts, and three overseers chosen *by the legal voters* in each. (12 Hen. Stats. 27 & seq.)

2<sup>s</sup>. Appointment, removal, and mode of securing fidelity of Overseers of poor; W. C.

1<sup>h</sup>. Modes of appointment, and of removal of Overseers of poor, and of securing their fidelity in England; W. C.

1<sup>i</sup>. Mode of *appointment* of Overseers of poor, in England.

By Stat. 43, Eliz. c. 2, they were appointed for a year, by two neighboring justices, in addition to the church-wardens. By Stat. 22 Geo. III, c. 83, parishes were authorized to substitute *guardians* for overseers, and by 59 Geo. III, c. 12, to substitute a committee of parishioners, called a *select vestry*. By Stat. 4 & 5 Wm. IV, c. 76, and several subsequent acts, the whole supervision of the execution of the poor-laws of the realm, was committed to a central board, called "*the poor law commissioners*," with power to make regulations for the guidance of the parochial authorities, subject to some restraints. (1 Bl. Com. 360; 3 Steph. Com. 200 & seq.)

2<sup>i</sup>. Mode of *removal* of Overseers of poor in England.

They are liable to be removed by the appointment of successors, by removal from the locality, or by reason of insolvency. They may also be excused for sufficient cause, by the general *quarter-sessions*. (4 Burn's Just. 24-'5.)

3<sup>i</sup>. Mode of *securing the fidelity* of Overseers of poor in England.

By the penalties for official malfeasance, or non-feasance. (4 Burn's Just. 30.)

2<sup>h</sup>. Mode of appointment and of removal of Overseers of the poor in Virginia, and of securing their fidelity; W. C.

1<sup>i</sup>. Mode of *appointment* of Overseers of the poor in Virginia.

Elected one in each magisterial district, by the voters thereof, to serve for two years, from 1st July ensuing election. (Va. Const. 1869, Art. VII, § 2; Amendm't 1874; V. C. 1873, c. 6, § 9.)

2<sup>i</sup>. Mode of *removal* of Overseers of poor in Virginia.

For causes, and by modes the same as in case of the sheriff. (*Ante* p. 93, 2<sup>i</sup>.)

3<sup>1</sup>. Modes of *securing the fidelity* of Overseers of poor ;  
W. C.

1<sup>k</sup>. Oaths of office.

The same as in case of the sheriff. (*Ante* p. 93, 1<sup>k</sup>.)

2<sup>k</sup>. Penalties for malfeasance, and non-feasance.

The penalties are such as the common law denounces against official malfeasance and non-feasance, namely: fine, and amotion from office. (Bac. Abr. Offices, (N); 1 Th. Co. Lit. 238-'9, & n (I, 1).)

3<sup>k</sup>. Official Bond.

In a penalty of from \$500 to 1000, to be determined by the court or judge when the overseer qualifies, it being required that the penalty shall *not be less than double* the amount which will probably pass through his hands. (V. C. 1873, c. 47, § 62.)

3<sup>g</sup>. Duties of Overseer of the poor; W. C.

1<sup>h</sup>. Duties of Overseer of the poor in England.

4 Burn's Just. 27 & seq.; Id. 248.

W. C.

1<sup>1</sup>. To raise money for the support of the poor.

They are to raise competent sums by levying *rates* on the parishioners, for the necessary relief of the impotent poor settled in the parish, who are not able to work. (1 Bl. Com. 360.)

2<sup>1</sup>. To provide work for the poor able to work.

1 Bl. Com. 360.

3<sup>1</sup>. To adjust in the first instance, questions of settlement, and to cause paupers to be removed to their own parish.

1 Bl. Com. 363; 3 Steph. Com. 207 & seq.; 4 Burn's Just. 411 & seq.

2<sup>h</sup>. Duties of Overseers of the poor in Virginia; W. C.

1<sup>1</sup>. Organization of Board of Overseers.

To meet at the time and place fixed by the county or town authorities, and appoint a president and clerk, whereupon they constitute a *corporation*, by the name of the *overseers of the poor of such county or town*. Afterwards they appoint their own meetings. (V. C. 1860, c. 51, § 2 to 4, 9; V. C. 1873, c. 47, § 51.) But such organization seems now to be superfluous, the former general supervision of the whole system in each county, which was vested in the board of overseers, being now devolved on the superintendent of the poor, and on the board of supervisors. The overseer's function appears to be practically such only as he exercises individually.

2<sup>1</sup>. Apparatus provided by law for the care of the poor.

A superintendent of the poor is elected, with other county officers, by the voters of each county, to serve for three years, and until his successor qualifies. (Art. VII, § 1, Va. Const. 1869.)

He qualifies before the judge of the circuit or county court of his county, by taking the oaths of office, and executing bond, with approved security, in a penalty prescribed by the judge or court, but in no case less than \$5,000. (V. C. 1873, c. 51, § 1.)

He has *charge of the county poor-house*, or when there is none, provides suitable accommodations, under the direction of the *board of supervisors*, making reports annually, or oftener, if required, of expenditures, and of whatever relates to the business of maintaining the poor. (V. C. 1873, c. 51, § 2 & seq.)

The board of supervisors may appoint a physician and nurse to attend the poor at the place of general reception for the county, and allow reasonable compensation therefor. (V. C. 1873, c. 51, § 2.)

While it is the business of the superintendent of the poor to take charge of and provide for all paupers committed to him at the place of *general reception* by the individual overseers, or otherwise, according to law, the expense is provided for according to an estimate submitted by the superintendent, by the board of supervisors of the county, which is also to provide necessary buildings, and a suitable farm, as a place of general reception for the poor of the county. (V. C. 1873, c. 51, § 2, 8, 9.)

3<sup>1</sup>. Powers and duties of individual overseers.

To provide for sending to the poor-house those paupers who are *settled* in the county or corporation; to repel intruders, and to arrest vagrants. (V. C. 1873, c. 51, § 6, 7, 12, 14.)

W. C.

1<sup>k</sup>. Who are the Poor to be provided for; W. C.1<sup>1</sup>. Who are Poor, within the law.

The poor within the law will include any one unable to maintain himself, and the family of one unable to maintain it, when the family is unable to maintain itself. (V. C. 1873, c. 51, § 14.)

2<sup>1</sup>. What poor are to be provided for.

Those *poor* are to be provided for who have a *legal settlement* in the county. A person has a legal settlement in a magisterial district who has *resided*

therein for *one year*, and in a *county or town*, who has *resided* in the same for *one year*; provided in either case, if he has migrated into the State within *three years*, he shall have been, at the time of migrating, *able to maintain himself*. (V. C. 1873, c. 51, § 14.) But doubtless, notwithstanding the silence of the statute, *birth, parentage, and the marriage of a feme*, will also confer a settlement. (4 Burn's Just. 416, 436, 473; 1 Bl. Com. 363, & n (53) to (55).)

The question of legal settlements has not yet occasioned much trouble with us. It is, however, not without its intricacies, and in England no branch of legal inquiry is more vexed with doubts and conflicting decisions. This is particularly liable to be the case where the marriage of a female intervenes to obscure or suspend her original settlement by birth, the husband having no settlement. Thus the widow of a foreigner, who had no *parochial settlement* in England, being left destitute on the death of her husband, was removed from a parish in London to her *native parish* in the country, which latter resisting the attempt to charge it with an additional pauper, the case came up for decision to the court of King's bench, which held that the woman's settlement was *suspended* by the marriage during the husband's life-time, but that upon his death it *revived* again. But some years afterwards, another case of like kind occurred, except that the unsettled husband did not die, but *ran away*. The King's bench thereupon reviewed its former judgment, and reversing its previous doctrine, with the same *unanimity* with which it had pronounced it, determined that a *suspension* of the settlement could not be maintained, but that the maiden settlement continues after marriage, until a *new settlement is gained*; and that, although the wife cannot be separated from her husband by an order of removal, yet if he, having no settlement, has deserted her, she may be sent to her parish for relief, *even in his life-time*. (1 Bl. Com. 363; St. Michael v. Nully, 1 Stra. 544; Rex v. Hincksworth, 1 Dougl. 46, n (13); Rex v. Leigh, 1 Dougl. 46; 2 Campb. Lives of Ch. Justices, 182-'83.)

2\*. To whom application for relief is to be made.

To the overseer of the magisterial district wherein the pauper has a legal settlement; or if he

has a legal settlement in the *county*, but not in any particular district therein, it would seem that application may be made to *any overseer* of the county, or rather to the overseer of the district wherein such pauper *may be*. (V. C. 1873, c. 51, § 14.)

3<sup>k</sup>. Redress, if relief is wrongfully refused.

Afforded by the court of the county or corporation, which will compel the overseer to give the proper relief. (V. C. 1873, c. 51, § 15.)

4<sup>k</sup>. Modes of maintaining or assisting the poor; W. C.

1<sup>l</sup>. General rule.

The pauper must be sent to, and kept at, the place of *general reception* of the poor for the county, and if able to work, shall be made to do so. (V. C. 1873, c. 51, § 12.)

2<sup>l</sup>. Proviso.

That a district overseer, by consent of the *supervisor* of the district, and of the *county superintendent of the poor*, may provide assistance at the *pauper's residence* (supposing him to have a legal settlement in the district), but it must be *exclusively* at the expense of the district, and not of the *county*, and particular reports of such cases are required to be made to the *county superintendent* annually. (V. C. 1873, c. 51, § 12.)

5<sup>k</sup>. Removal of intruders not legally settled; W. C.

1<sup>l</sup>. Removal of intruder having a legal settlement in the Commonwealth; W. C.

1<sup>m</sup>. Mode of removal.

Upon complaint of an overseer to a justice of *the district*, the justice by warrant shall cause the pauper to be removed to "*the town or district*" (*i. e.*, as is supposed, to the *county* wherein is the district) of his legal settlement, but not to the prejudice of his health. (V. C. 1873, ch. 51, § 16, 17.)

2<sup>m</sup>. Proceeding if the overseer of the pauper's legal settlement refuse to receive him.

Their legal obligation is not only to receive him, but to pay all the expenses attending his removal; and if they refuse, they may be compelled by their county or corporation court. (V. C. 1873, ch. 51, § 17.)

2<sup>l</sup>. Removal of intruder not having a legal settlement in the Commonwealth.

The overseer of the district *may himself issue a warrant* to a constable to carry a pauper to the

*State* where his legal settlement is. (V. C. 1873, ch. 51 § 18.)

6<sup>k</sup>. Proceeding against beggars and against vagrants; W. C.

1<sup>l</sup>. Proceeding against *beggars*.

The overseer is to issue a warrant to a constable to arrest all beggars going about, or staying in' one place to beg, and to carry them to the poor-house; or if they have no legal settlement in Virginia, then to remove them to the State where their legal settlement is. (V. C. 1873, ch. 51, § 18.)

2<sup>l</sup>. Proceeding against *vagrants*; W. C.

1<sup>m</sup>. Method of proceeding.

The overseer is to apply to a *justice of the peace*, whose duty it is, if, upon examination, the party prove to be a *vagrant*, to issue a warrant requiring the constable to *hire him out* for three months for the best wages that can be obtained, to be applied to the use of the vagrant or his family. And if he run away without sufficient cause, he is to be apprehended and returned to the hirer, who is then to have him *free of wages for a month additional*, and further steps are authorized to compel him to work, or else to inflict on him severe punishment in the way of imprisonment. (V. C. 1873, ch. 51, § 20.)

2<sup>m</sup>. Who are vagrants; W. C.

1<sup>n</sup>. Those who shall unlawfully return to a county or corporation after being lawfully removed.

V. C. 1873, ch. 51, § 19.

2<sup>n</sup>. Those who, being without means to maintain themselves and their families, *live idly and without employment*, and refuse to work for the usual wages given to other laborers in the like work, in the place where they are. Id.

3<sup>n</sup>. Those who shall refuse to perform the work allotted them by the overseer of the poor. Id.

4<sup>n</sup>. Those who go about from door to door, or place themselves in streets, highways, or other roads, to *beg alms*, and all persons wandering abroad and begging, unless disabled, or incapable of labor. Id.

5<sup>n</sup>. Those who come from *without the Commonwealth*, and loiter or reside therein, following no labor, trade, occupation, or business, having no visible means of subsistence, and who can give no rea-

*sonable account* of themselves, or their business in the place where they are. Id.

7<sup>k</sup>. Proceeding in respect to *pauper children*; W. C.

1<sup>l</sup>. Proceeding touching bastards.

An overseer of the poor was never by law allowed to *inaugurate a proceeding* to charge a *putative father* with the support of a bastard. The *mother* must first have *voluntarily* made oath before a justice of the peace to the paternity of the child; but when the accusation had once been made, proceedings thereupon might have been had as well at the instance of the overseer as of the woman, the Attorney for the Commonwealth appearing in behalf of either. The putative father, having been arrested, was required to enter into recognizance to appear to answer the charge, and if convicted of it, was constrained to give bond to pay *annually* to the overseers of the poor, for the maintenance of the child, such sums as the court might order. (V. C. 1873, c. 121, § 1 to 3 & seq.) But this provision being applicable only to *white women*, an apprehension arose that it was in conflict with the provision of the Civil Rights Act of 1866 (Rev. Stats. U. S. p. 348, § 1977 & seq.), or to Amendment XIV of U. S. Constitution, and under the influence of that groundless apprehension, the whole doctrine touching the charging of putative fathers with the maintenance of bastards was repealed. (Acts 1874-'5, p. 94, c. 112.)

2<sup>l</sup>. Proceedings to *provide* for pauper children.

An overseer of the poor, by *previous order of the county or corporation court* may place in an incorporated asylum for destitute children, or may bind apprentice, any minor *found begging* in his county or corporation, or *likely to become chargeable thereto*; and the master of such apprentice is *bound by law*, whether it be so stipulated or not, to teach him reading, writing, and common arithmetic, including the rule of three. (V. C. 1873, c. 122, § 3, 5.)

7<sup>r</sup>. Escheators; W. C.

1<sup>s</sup>. Antiquity and original of the office of Escheator W. C.

1<sup>a</sup>. Antiquity and original of the office of Escheator in England.

The escheator is an ancient office of great importance, while the feudal tenures, with their oppressive incidents, flourished in vigor. There were but two in



the realm originally, one to act south of the Trent, and the other beyond it. Great abuses having been committed by escheators in previous reigns, it was ordained by 14 Edw. III, c. 8; 36 Edw. III, c. 13; and 38 Edw. III, c. 2, that one should be appointed *annually*, for every county, like sheriffs, by the chancellor, treasurer, chief baron, and two chief justices; that they should do no waste in the lands they seized; that they severally should take their inquests *openly, and not privately*, by persons of substance and character in the county where the lands were, by *indenture* between them and the escheator himself; and that he should return the inquest promptly into chancery, where it was liable to be *traversed*, or controverted, within a limited time. And those safeguards were further strengthened by 18 Hen. VI, c. 6, and 1 Hen. VIII, c. 8. (1 Jac. L. Dict. Escheator; 2 Reeves' Hist. Eng. Law, 273, 276; 4 Do. 231; 2 Th. Co. Lit. 196, 197, & n (L).)

2<sup>h</sup>. Antiquity and original of the office of Escheator in Virginia.

The first mention of escheats is in an act of Assembly of March, 1659, whereby certain lands liable to escheat were appropriated to indemnify the county of New Kent, for money paid by it for the deceased owner. (1 Hen. Stats. 548.) The royal commissioners in March, 1661, proposed sundry provisions to quiet the titles of persons who had bought lands *liable to escheat* of the *administrators* of decedents, and it would seem that at that time no escheators existed. (2 Hen. Stats. 56, 136.) But in 1703 Beverly mentions the form of proceedings observed in order to escheat lands (Bev. Hist. Va. 243), and from an act of Oct. 1705, (4 Anne,) it seems inquests of escheat had been repeatedly taken since 1676, (28 Car. II,) doubtless in pursuance of the law and practice in England; but still no provision appears for the appointment of escheators, (3 Hen. Stats. 316); nor does any seem to have been *formally* made until 1785, when the county courts were required to nominate some proper person to be commissioned by the governor and council. (12 Hen. Stats. 117.) Traces of proceedings of escheat, however, and of the existence of escheators, are met with, *e. g.*, in May, 1779. (10 Hen. Stats. 67 & seq.)

By act of November 1792, escheators are directed to be appointed, as they have ever since been, for every county and corporation, by the governor, upon the recommendation of the county or corporation



court. (1 Stats. at large (New series), 51; V. C. 1873, c. 109, § 1 & seq.)

2<sup>g</sup>. Mode of appointment and of removal of Escheators, and of securing their fidelity; W. C.

1<sup>h</sup>. Mode of appointment, and of removal, &c., in England; W. C.

1<sup>i</sup>. Mode of *appointment* of Escheators in England.

Appointed, it seems, *annually*, by the chancellor, treasurer, chief baron, and two chief justices. (1 Th. Co. Lit. 196; Bac. Abr. Prerog. (B); 2 Reeves' Hist. E. L. 273.)

2<sup>i</sup>. Mode of *removal* of Escheators in England.

By judgment of a competent court upon conviction (on indictment or information), for malfeasance or non-feasance; or for removal from the sphere of duty, *i. e.*, from the county. (1 Th. Co. Lit. 237, & seq.; Id. 239, and n (K. 1); Bac. Abr. Offices, (M) and (N); Jac. Law Dict. Office, IV.)

3<sup>i</sup>. Mode of *securing fidelity* of Escheator in England.

By the penalties for official malfeasance and non-feasance. (Bac. Abr. Offices, (M) and (N).)

2<sup>h</sup>. Mode of appointment, and of removal of the Escheator, and of securing his fidelity in Virginia; W. C.

1<sup>i</sup>. Mode of *appointment* of the Escheator in Virginia.

One escheator shall be appointed by the governor, for every county, and for every town having a corporation court, to hold office during good behavior, (V. C. 1873, c. 109, § 1.)

2<sup>i</sup>. Mode of *removal* of the Escheator in Virginia.

He may be removed by the governor, for misbehavior, incapacity, or neglect of official duty; or by the appointment and qualification of a successor; or by judgment of a competent court, upon conviction of malfeasance, non-feasance, removal from sphere of duty, &c. (V. C. 1873, c. 109, § 2; Bac. Abr. Offices, (M) and (N); *supra* 2<sup>i</sup>; *ante* p. 93.)

3<sup>i</sup>. Mode of *securing fidelity* of the Escheator in Virginia; W. C.

1<sup>k</sup>. Oaths of office.

Same as in case of sheriff. (*Ante* p. 93, 1<sup>k</sup>.)

2<sup>k</sup>. Official Bond.

In the penalty of \$3000, payable to the Commonwealth. (V. C. 1873, c. 109, § 2; Id., c. 12, § 6.)

3<sup>g</sup>. Duties of Escheator; W. C.

1<sup>h</sup>. Duties of the Escheator in England.

To look properly to escheats, *wardships*, (abolished for the most part, since Stat. 12 Car. II), and other

casualties, belonging to the crown. He conducts his inquiries by means of a *jury of inquest*, composed of *freeholders*, sitting publicly, and certifies the inquisition, in the form of an *indenture* between himself and the jurors, into the Court of Chancery, where it may be *traversed*, within a limited time. (Bac. Abr. Prerog. (B).)

2<sup>b</sup>. Duties of the Escheator in Virginia.

Upon information from the commissioner of the revenue of the county or corporation (which information it is the commissioner's duty to furnish annually), or from any other person, *in writing* under oath, of any lands in his county or corporation, as to which any one who was seized thereof, has died intestate and without any known heir, or to which *no person is known by him to be entitled*, to proceed to cause the same to be escheated to the commonwealth. (V. C. 1873, ch. 109, § 3, & seq.)

W. C.

1<sup>a</sup>. What lands are exempt from escheat.

Such as for twenty years have been in the *actual possession* of the person claiming the same, or those under whom he holds, and upon which taxes have been paid *within that time*; and those also where the *legal title alone* is liable to escheat, the beneficial ownership not being so liable. (V. C. 1873, ch. 109, § 3, 25.) So lands are not liable to escheat which are by will devised to be sold, and the *proceeds* given to *aliens*. Such a devise is not adverse to the policy of the law, since aliens thereby acquire no interest in the lands, but in the *proceeds* only. (Com'th v. Martin's Ex'ors, 5 Munf. 117; Com'th v. Selden & als, Id. 160.)

2<sup>a</sup>. Proceedings by the Escheator in Virginia, to escheat lands; W. C.

1<sup>k</sup>. Public notice of the inquest.

By advertisement at the door of the court-house for thirty days, including a court day. (V. C. 1873, ch. 109, § 4.)

2<sup>k</sup>. Inquest of Escheat.

The sheriff or sergeant is to summon sixteen *freeholders*, of whom *at least twelve*, must be impannelled as jurors. They meet at the court-house and sit *in public*, and may be adjourned by the escheator from day to day, and may be punished by the *circuit court* for non-attendance, every person being suffered to give evidence *openly* in the presence of the jurors. (V. C. 1873, ch. 109, § 5, 6.)

If the title liable to escheat be an *equitable* one, the escheator must proceed to enforce the rights of the commonwealth by a *bill in equity*. (Bac. Abr. Alien (C.); Com'th v. Martin, 5 Munf. 117; Hubbard v. Goodwin, 3 Leigh, 510, & seq.)

3<sup>k</sup>. The verdict or inquisition of the jurors.

Twelve at least of the jurors must concur in the verdict of escheat, and must *sign the same* as well as the escheator, whose duty it is, within sixty days, to transmit the substance of it to the register of the land-office, and within thirty days to return the inquisition to the *clerk of the circuit court*, who, within thirty days from the receipt of it, is required to transmit a copy to the clerk of the county or corporation court to be recorded. (V. C. 1873, ch. 109, § 14, 7.)

4<sup>k</sup>. Redress afforded to persons aggrieved by the verdict of escheat.

Persons aggrieved, whether their interest be legal or equitable, may apply for redress by *petition* (which is understood to be equivalent to a *bill in equity*) to the *circuit court* of the county or corporation where the proceedings of escheat took place, making the escheator defendant, who shall file an answer, and upon the petition, answer and evidence, the cause shall be heard without unnecessary delay. Disputed facts are ascertained *by a jury*, whose verdict, however, the court, if it sees fit, may set aside. The lands, pending the petition, may be committed to the claimant, on his giving bond, with good security, to pay the rents and profits to the commonwealth, if the right be found in its favor; or if not so committed, they remain in the escheator's hands, to be leased out by him, he being answerable (according as the right is determined) to the commonwealth or to the claimant for the rents and profits, and for *waste*. Persons aggrieved may also, instead of proceeding by petition or bill in equity (which is a statutory remedy), resort to—

1. *Petition of Right*, which is a common law proceeding in chancery in the nature of a real action, prosecuted by leave of the Crown or the commonwealth, to recover lands, &c., illegally seized by public authority. (3 Bl. Com. 256; Bac. Abr. Prerog. (E).)

2. *Monstrans de Droit*, which is likewise a common law proceeding in chancery, whereby the rights of a subject, when invaded by the Crown or commonwealth, are vindicated. (3 Bl. Com. 256–'7; Bac.

Abr. Prerog. (E); *Edwards v. Van Bibber*, 1 Leigh, 194; *Fiott & als v. Com'th*, 12 Grat. 565.)

3. *Traverse of Office*, which is a proceeding (allowed by Stat. 2 and 3 Ed. VI, c. 8, (V. C. 1873, ch. 15, § 2), whereby the subject may contest or deny the truth and validity of inquisitions of office. (3 Bl. Com. 257; Bac. Abr. Prerog. (E); *Fiott & als v. Com'th*, 12 Grat. 565.)

The *Petition of Right* and the *Monstrans de Droit* are said by Blackstone to be of common law origin; but the latter was much improved by Stat. 36 Ed. III, c. 13; and 2 and 3 Ed. VI, c. 8. (3 Bl. Com. 257; V. C. 1873, ch. 15, § 2; Bac. Abr. Prerog. (E).) (V. C. 1873, ch. 109, § 8 to 12, 28; *Edwards v. Van Bibber*, 1 Leigh, 194; *Hite's Case*, 6 Leigh, 588; *Fiott & als v. Com'th*, 12 Grat. 564.)

5<sup>k</sup>. Proceedings to sell escheated lands.

They are sold under the *direction of the governor*, after giving public notice of the escheat and of the sale for six weeks in the newspapers of Richmond and of Washington. The escheator makes the sale as directed by the statute, and pays the proceeds into the treasury, deducting a commission of *ten per cent.* on the proceeds. (V. C. 1873, ch. 109, § 13 to 24.)

6<sup>k</sup>. Provision made in favor of *tenants of escheated lands*, and *creditors of the last owner*.

The interests of such persons are protected, whether found in the inquisition or not. The creditor proceeds *in equity*. (V. C. c. 109, § 26-'7; *Watson v. Lyle's Adm'r*, 4 Leigh, 236.)

8<sup>f</sup>. Supervisors.

One supervisor is elected for each magisterial district by the voters thereof, to serve for *two years*. (Va. Const. 1869, Art. VII, § 2, Amendm't 1874.) The supervisors of all the districts constitute the *Board of Supervisors* for the county, whose duty it is to audit the accounts of the several county officers; to examine the books of the commissioners of the revenue, and equalize the valuation of property; to fix the county levies for the ensuing year, (for the purpose of public buildings, roads, poor, schools, &c.; and to perform any other duties required by law. (Va. Const. 1869, Art. VII, § 2.) See V. C. 1873, c. 47, 4 to 26.

## CHAPTER X.

## OF THE PEOPLE, WHETHER ALIENS, DENIZENS OR CITIZENS.

2<sup>d</sup>. The Relation of People, and the Rights and correspondent Duties belonging thereto; W. C.

1<sup>o</sup>. The doctrine of Allegiance.

Allegiance is the tie (*ligamen*) which binds the subject to the government, in return for protection. The *thing* is founded in reason, and the nature of government. The *name and form* are derived from the feudal system, transmitted from our Gothic ancestors. (1 Bl. Com. 366; 2 Steph. Com. 420); W. C.

1<sup>t</sup>. The nature of Allegiance; W. C.

1<sup>s</sup>. The different sorts of Allegiance; W. C.

1<sup>h</sup>. Natural Allegiance.

Which is due from all born within a country, immediately upon birth, in return for the protection afforded, and also as indispensable to the maintenance of society, which the Creator has ordained. It is permanent, and although not perpetual and inalienable, as the common law held it, yet subsists as long as one continues a member of the community in which he was born, and cannot, without *moral* offence, be abjured, save with due regard to that community's interests and will. (1 Bl. Com. 370; 1 Tuck. Bl. (Pt. II), App'x 91, n (K); 2 Kent's Com. 45, 49; 1 Tuck. Com. B. I, p. 57 to 60.)

2<sup>h</sup>. Local, or temporary Allegiance.

Such as is due even from an alien, as long as he continues within the State's dominion and protection; and ceases when he transfers himself to another country. Allegiance is the correlative of protection, and continues as long as the protection does. Hence it is due to a *de facto* government,—to practice against which will not only be regarded *by itself* as treasonable, and be punished accordingly, but will be punished also by the rightful government when restored, except in so far as the attempt was in defence or aid of the rightful authority;—*e. g.*, in case of Edward IV, who, upon his accession, punished treasons against his predecessor, Henry VI, whom notwithstanding, he and his parliament pronounced a usurper. (1 Bl. Com. 370-'71; 1 Tuck. Com. 59; Bac. Abr. Aliens, (C. 2).)

2<sup>s</sup>. The obligations and rights growing out of Allegiance; W. C.

1<sup>h</sup>. The obligations growing out of Allegiance.

They are independent of, and prior to, any recognition thereof by oath or otherwise, and are concisely expressed in the ancient oath of allegiance, as administered in England for 600 years, prior to the Revolution of 1688, when it was made more general. The old form expressed a promise: "*to be true and faithful to the King and his heirs, and truth and faith to bear of life and limb, and terrene honor and not to know or hear of any ill or damage intended him without defending him therefrom.*" (1 Bl. Com. 368, 369.)

2<sup>b</sup>. The Rights growing out of Allegiance.

These, like the obligations, exist antecedently to, and independently of the sovereign's express promise, although the coronation oath in England exhibits a very just summary thereof,—engaging that the monarch shall govern according to the established laws; that he will cause law and justice, in mercy, to be executed, and that he will preserve the rights and privileges of every class of his people. (1 Bl. Com. 369; 2 Steph. Com. 417-'18.)

2<sup>c</sup>. The right to renounce Allegiance; W. C.

1<sup>a</sup>. Doctrine at Common law.

The natural allegiance above-mentioned is esteemed by the common law to be *perpetual and inalienable*, without consent of the government, the prevailing maxim being, *nemo potest exuere patriam.* (1 Bl. Com. 369-'70, & n (5); Fost. Cr. L., 184-'5; 1 Kent's Com. 42, 49; Doe v. Acklam, 2 B. & Cr. 779.)

2<sup>a</sup>. Doctrine in Virginia.

The doctrine in Virginia is that the natural liberty of going whither one pleases cannot be circumscribed, consistently with *civil liberty*, save only so far as the general safety of the community may require. Hence it is inferred that, whilst the expatriation of a citizen may properly be forbidden in times of danger and crisis (*e. g.*, in time of war), it is a violation of his natural rights to deny it under other circumstances; and that being a part of the natural liberty of mankind, if there be no positive law qualifying the right, it exists *without restriction.* (1 Tuck. Bl. (Pt. II), App'x. 90; Puffend. B. VIII, c. 11, § 1 to 4; Vat. Law of N., B. I, § 223, & seq.; 2 Kent's Com. 49; Grot. de Jur. Bell. et P. B. 2, c. 5, § 24; 2 Burlamaq, p. 119, Pt. II, c. 5, § 13.) See Talbot v. Jansen, 3 Dall. 152; Murray v. The Charming Betsy, 2 Cr. 115; Santiss<sup>a</sup> Trinidad, 7 Wheat. 347 (where the point is left undecided). But see Williams' case, Whart. Am. St. Tri. 652, 655; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet. 99;

and *Shanks v. Dupont*, 3 Pet. 242, which are adverse to the Virginia doctrine.

In Virginia, provision is made for the exercise of the right, except in *time of war*, by declaration entered of record in the county or corporation court of the county or corporation where the party *resides*, or by deed proved by two *subscribing* witnesses in the same court, and by *departing out of the country*; and this may be done permanently, or for a time only. (V. C. 1873, c. 4, § 2, 3, 4; *Murray v. McCarty*, 2 Munf. 396; *Branch v. Bowman*, 2 Leigh, 170.)

3<sup>s</sup>. Effect of expatriation from Virginia, on citizenship in the United States.

As a separate allegiance is due to the United States (it being possible for one to be a citizen of the United States, and not of any State, *e. g.*, in case of a resident of the District of Columbia, or of the Territories), it would seem that expatriation from Virginia *would not affect citizenship in the United States*. (*Talbot v. Jansen*, 3 Dal. 153-'4, 164; *Murray v. McCarty*, 2 Munf. 404; Const. U. S. Amendm'ts XIV.)

4<sup>s</sup>. Doctrine in respect to the United States.

The Congress of the United States has made no provision touching the subject of expatriation; and the right is supposed, therefore, to exist in respect to the United States *without restriction*. But see 2 Kent's Com. 49. See *Shanks v. Dupont & al*, 3 Pet. 246; *Inglis v. Sailor's Snug Harbor*, 2 Pet. 99.

The assumption upon which these authorities rest, namely, that the common law is a part of the law of the United States in their aggregate capacity, seems to be a remarkable inadvertence. If any proposition of a politico-legal character can be deemed settled by argument, the famous Virginia (or Madison's) Report of 1799 has determined that the common law is not thus a part of the law of the United States. (Va. Report, Resolution V, p. 211 & seq.)

3<sup>d</sup>. The Oath of Allegiance.

It adds nothing, as has been seen, to the obligation of the citizen, seeking merely to strengthen the *social tie* by impressing the mind with the sanctions of religion. (2 Steph. Com. 423; 1 Bl. Com. 369-'71.)

W. C.

1<sup>s</sup>. The Oath of Allegiance in England.

It contains a brief summary of the citizen's duties, and besides being required of all persons *in office*, it may be *tendered* by two justices to any one suspected



of disloyalty. (1 Bl. Com. 368, 369; 2 Steph. Com. 423-'4.)

2<sup>s</sup>. The Oath of Allegiance in Virginia.

All *State and Federal* officers and legislators are required to take an oath to support the constitution and laws of the United States; and the State officers and legislators also swear in addition, to support the constitution and laws of Virginia. (U. S. Const., Art. VI, § 3; Va. Const. 1869, Art. III, § 6; V. C. 1873, c. 12, § 1.)

2<sup>o</sup>. The different classes of people in a country; W. C.

1<sup>t</sup>. The different classes of people in England; W. C.

1<sup>s</sup>. Aliens.

All persons, by the common law, are aliens who are not born within the dominions, or *ligeance* of the Crown of England, either actually or by *construction* of law (*e. g.*, the children of a British ambassador born abroad, or children whose father, or grandfather on the father's side, is a natural-born subject), and who have not been *naturalized*, or made *denizens*. (1 Bl. Com. 366, & n (1); Bac. Abr. Aliens, (A); Calvin's case, 7 Co. 16<sup>a</sup>.)

2<sup>s</sup>. Denizens.

A denizen is an *alien-born*, who, *ex donatione regis*, or by act of parliament, has obtained letters patent to make him an English subject. He may acquire and *hold* lands, by *purchase*, (*i. e.* by his *own act*), but not by *descent*, because his parent, through whom he must deduce his claim, had *no inheritable blood*; and for a like reason his issue, born before denizenation, cannot inherit to him. He is incapable of any grant of lands *from the Crown*, of being a member of Parliament, or of holding *any office*. (1 Bl. Com. 374, & n (20); Bac. Abr. Aliens, (B).)

3<sup>s</sup>. Citizens; W. C.

1<sup>h</sup>. Natural-born Citizens; W. C.

1<sup>i</sup>. Persons born in England.

All persons *born in England* are natural-born subjects, *although their parents are aliens*—unless the parents were in the realm as *enemies*. (1 Bl. Com. 366, & n (1); Id. 374, & n (16); Calvin's case, 7 Co. 18<sup>a</sup>.)

2<sup>i</sup>. Persons born in any of the dominions, or within the *ligeance* of the English crown.

*e. g.*, Persons born in Ireland, Scotland, Wales, or in the English colonies in America, or elsewhere; or in any conquest of England; or of English parents, in a country *overrun by English troops*. (1 Bl. Com. 366,



& n (1); Bac. Abr. Aliens, (A); Calvin's case, 7 Co. 18<sup>a</sup>.)

3<sup>1</sup>. Persons born abroad, but *constructively* in England. *e. g.*, Children of English ambassadors, or other persons in the public service abroad. (1 Bl. Com. 366, & n (1), 373; Bac. Abr. Aliens, (A).)

4<sup>1</sup>. Persons born abroad whose father, or grandfather, on the father's side, was a natural-born subject.  
1 Bl. Com. 366, n (1).

2<sup>h</sup>. Naturalized Citizens.

There are no *general* naturalization laws in England, whose crowded population makes it undesirable to relax the disabilities of alienage. With a few exceptions, a special act of Parliament is needed in each case, and is always accompanied by certain qualifications, as that the party shall not be a member of parliament, nor hold any office, nor receive any grant from the Crown. It does not release him from what is called his *natural allegiance* to the State where he was born; and if any conflict of duties ensues, he must submit to the consequences, resulting as they do from his own act. (1 Bl. Com. 374, & n (21); Tuck. Com. 63, &c., B. I.)

2<sup>f</sup>. The different classes of people in Virginia; W. C.

1<sup>g</sup>. Aliens.

All persons are aliens in Virginia who are not born within the limits of the dominion of the United States, or whose *fathers*, at the time of their birth, were not citizens of the United States, and who have not been naturalized. (Const. U. S. Amendments XIV, § 1; 1 Bright. Dig. 132.).

2<sup>g</sup>. Citizens; W. C.

1<sup>h</sup>. Persons who are, or may be, citizens by right of birth.  
W. C.

1<sup>i</sup>. Persons born in Virginia.

Even of *alien parents*, unless the parents were present in the State *as enemies*. (V. C. 1773, c. 4, § 1; *Supra* p , 1<sup>i</sup>; *Supra* 4, 1.)

2<sup>i</sup>. Persons born in any other State of the Union, (including any territory of the United States, or the District of Columbia,) and *resident in Virginia*.

V. C. 1873, c. 4, § 1; Id. c. 15, § 9, (cl. 1); Const. U. S. Amendments XIV, § 1; Towles' case, 5 Leigh, 748; 2 Stor. Const. § 1693.)

3<sup>i</sup>. Persons, wheresoever born, whose father, or if he be dead, whose mother, was a citizen of Virginia at the time of his birth.

V. C. 1873, c. 4, § 1. But not if the *grandmother*

were a Virginian. (*Barzizas v. Hopkins*, 2 Rand. 276; *Orr v. Hodgson*, 4 Wheat. 460.)

- 4<sup>1</sup>. Persons born out of the limits and jurisdiction of the United States, whose fathers, at the time of their birth, were citizens of the United States, such persons being residents in Virginia.

1 Bright. Dig. 132; Rev. Stats. U. S. p. 351, § 1993.

- 5<sup>1</sup>. Persons entitled to citizenship under former laws.

V. C. 1873, ch. 4, § 1.

- 2<sup>h</sup>. Naturalized citizens.

Persons naturalized under the laws of the United States, and *resident in Virginia*, are citizens thereof by the effect of the original Constitution of the United States, empowering Congress to establish an *uniform rule* of naturalization; besides which they are declared in terms to be such by statute with us, and also by Const. U. S. Amendments XV. (Const. U. S. Art. I, § viii, 4; Id. Amendm'ts, XV, § 1; Id. Art. IV, § ii, 1; *Towle's Case*, 5 Leigh, 748; V. C. 1873, ch. 4, § 1; 2 Stor. Const. § 1694 )

W. C.

- 1<sup>1</sup>. Proceedings for the purpose of Naturalization.

The power of naturalization is vested *exclusively* in Congress, and cannot be exercised by any of the States. (*Chirac v. Chirac*, 2 Wheat. 269; *Barzizas v. Hopkins*, &c., 2 Rand. 285.)

The States, however, are not excluded from allowing aliens *any privileges*, touching the ownership of lands, or participation in the State governments, which they may severally think fit to confer, within their respective limits (constituting them a *kind of denizens*), they only cannot make them *citizens* in such a sense that they shall be citizens of the *United States*. (Rev. Stats. U. S. p. 380, § 2165; 1 Bright. Dig. 33; 2 Do. 5; 1 Tuck. Com. 63; *Barzizas v. Hopkins*, 2 Rand. 285; 2 Kent's Com. 64; *Dred Scott v. Sandford*, 19 How. 393.)

W. C.

- 1<sup>k</sup>. Character of the party to be naturalized.

*Any alien friend*, including aliens of African nativity, and persons of African descent, may be admitted to become a citizen of the United States, in the manner presently to be described, and not otherwise. (Rev. Stats. U. S. p. 380, & seq., § 2165, & seq., 2169, 2171.) But the party may be a *married woman*, and she may be naturalized without the concurrence of her husband. (*Priest v. Cummings*, 16 Wend. 617; *Shanks v. Dupont*, 3 Pet. 248.)

2<sup>a</sup>. Preliminary declaration of the party to be naturalized.

To be made on oath before some court of record, State or Federal, *two years at least* before his admission as a citizen, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance to any foreign prince or State, and particularly by name to the prince or State whereof he is at the time a subject. (1 Bright. Dig. 33, § 1; Id. 36, § 12; Rev. Stats. U. S. p. 380, § 2165.)

This preliminary declaration may be dispensed with where the alien has resided within the United States *three years* before attaining his age. (1 Bright. Dig. 36, § 10 Rev. Stats. U. S. p. 381, § 2167.)

3<sup>a</sup>. Proceedings when alien *applies to be admitted a citizen*; W. C.

1<sup>l</sup>. Before what courts proceedings may be had.

Before any court of record, *State or Federal*, which acts *judicially* in admitting the person to citizenship. (1 Bright. Dig. 33, § 1; Id. 34, § 2; 2 Bright. Dig. 5, *note*; Rev. Stats. U. S. p. 380, § 2165, &c.)

2<sup>l</sup>. Declaration to be made by the party at the *time of admission* as a citizen.

To declare on oath that he will support the Constitution of the United States, and that he renounces all allegiance and fidelity to every foreign prince or State, and particularly by name to the prince or State of which he is then a subject, which proceedings are to be recorded. (1 Bright. Dig. 33-'4, § 1; Rev. Stats. U. S. p. 380, § 2165.)

3<sup>l</sup>. Proof to be furnished by the party applying to be admitted a citizen.

That he has made the preliminary declaration required, which must be proved *by the record*; and (which is to be proved *by parol*), that he has *resided* within the United States five years, at least, and within the State or Territory where the court sits one year, at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well-disposed to the good order and happiness of the same. (1 Bright. Dig. 34, § 1; Rev. Stats. U. S., p. 380, § 2165, 2170, 2174.)

4<sup>l</sup>. Renunciation by the party of his title or order of nobility, if he has any.

1 Bright. Dig. 34, § 1; Rev. Stats. U. S., p. 380, § 2165.

4<sup>k</sup>. Effect of sentence admitting an alien to citizenship.

The sentence is *conclusive evidence* of the facts it recites, and on which it is founded, nor can any enquiry be gone into behind it. The alien becomes, by the sentence, entitled to all the privileges of a natural-born subject, except that he can never be President of the United States, nor can be a member of the House of Representatives until he has been a citizen *seven* years, nor of the Senate until after *nine* years. (Campbell v. Gordon, 6 Cr. 182; Starke v. Ches. Insur. Co., 7 Cr. 420; Towles' Case, 5 Leigh, 743; Const. U. S., Art. I, § ii, 2, and § iii, 3.)

2<sup>l</sup>. Instances of irregular naturalization; W. C.

1<sup>k</sup>. The minor children of duly naturalized aliens.

If *dwelling* in the United States, they shall be considered citizens. (1 Bright. Dig. 35, § 3; Rev. Stats. U. S., p. 382, § 2172; Campbell v. Gordon, 6 Cr. 177; State v. Penney, 5 Eng. 621.)

2<sup>k</sup>. The wife of a citizen, native or naturalized.

If capable of naturalization, she is deemed a citizen, provided she does not continue, throughout her husband's life-time, a *non-resident*. (1 Bright. Dig. 132, § 2; 2 Do. 5, *note*.)

3<sup>k</sup>. The widow and children of one who has made the preliminary declaration, but who dies before admission as a citizen.

They are deemed citizens. (1 Bright. Dig. 35, § 6; Rev. Stats. U. S., p. 382, § 2168.)

4<sup>k</sup>. Aliens above twenty-one years of age, who have enlisted, or may enlist in the military service of the United States, and been honorably discharged.

They are to be admitted to citizenship without the preliminary declaration, upon proof of *one year's* residence, and good moral character, and without qualification *as to race*. (2 Bright. Dig. 5; Rev. Stats. U. S., p. 381, § 2166.)

3<sup>e</sup>. The Rights of the people, as aliens or citizens; W. C.

1<sup>l</sup>. Political Rights.

These belong properly to *citizens only*, by the very nature of society, it being a matter of vital concern that they should not be exercised by persons who may not only have no interest in the welfare of the State, but

may be actually interested in its ruin. The U. S. Constitution, in declaring (Art. IV, § ii, 1), that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, must be understood to contemplate no other rights than those of property and person. (*Murray v. McCarty*, 2 Munf. 398; *Corfield v. Coryell*, 4 Wash. C. Ct. 880; *Conner v. Elliott*, 18 How. 591.)

2<sup>d</sup>. Rights of property; W. C.

1<sup>a</sup>. Rights touching *personal* property; W. C.

1<sup>b</sup>. Rights to personal property, as respects aliens, &c.

An *alien-friend* may acquire and hold property in goods, money, and other movable effects, including also *choses in action*, or debts, &c., and may secure the debts due him by mortgage, deed of trust, or other lien upon lands, such lien being only an *incident* to the debt, and so partaking, in the view of a court of equity, of its nature. And in like manner, as equity considers that as done which is agreed or ordered to be done, if land be directed (*e. g.*, by will), to be sold, and the proceeds to go to an alien, it will be deemed a bequest of the money, and so will be valid. (1 Bl. Com. 372; *Hughes v. Edward*, 9 Wheat, 489; *Com'th v. Dev'ees of Martin*, 5 Munf. 117; *Com'th v. Selden*, Id. 160; *Craig v. Leslie*, 3 Wheat, 576.)

This liberality as to personalty is extended to aliens, because it is at once safe, and promotive of the interests of trade; and for a like reason, an *alien friend* may hire a house for his *habitation*, although the common law rigorously forbade him to acquire any further interest in *lands*. (1 Bl. Com. 372.)

From obvious considerations of policy, an *alien-enemy* is allowed to enter into no contract with a citizen, save only a contract for the *ransom of ships* captured at sea; nor can any contract with an alien-enemy, although entered into before the war, be enforced whilst the war is in progress. The hostile-alienage, in the one case, is a *plea in bar*, and in the other, a *plea in suspension* of the action. And similar disabilities apply to a neutral, and even to a citizen *domiciled* in the enemy's country. (1 Tuck. Com. 69, B. I; 1 Bl. Com. 373, and n's (13) and (14); *Bagwell v. Babe*, 1 Rand. 272; *Bac. Abr. Aliens* (D); 1 Th. Co. Lit. 93, and n (H); 1 Rob. Pr. (2nd Ed.) 298-9; 5 do. 31; *Billgerry v. Branch*, 19 Grat. 393; *Manhattan Ins. Co. v. Warwick*, 20 Grat. 393; *Hale v. Wall*, 22 Grat. 424.)

2<sup>b</sup>. Mode whereby an Alien is to dispose of his personal property.

The disposition must be regulated by the *law of his domicil* (lex domicilii), or permanent residence at the time of the disposition, *i. e.* if the disposition be *by will*, at the *time of his death*. (1 Tuck. Com. p. 69, B. I; V. C. c. 122, § 6; Stor. Conf. L. § 380; Bac. Abr. Aliens, (C. 2).)

2<sup>s</sup>. Rights of Aliens touching *real property*; W. C.

1<sup>a</sup>. History of the doctrine touching rights of Aliens to real property.

There is a diversity of opinion as to the origin of the disabilities of aliens touching lands. By some it is referred to the time of Henry II, when a law was made, at the parliament of Wallingford, for the expulsion of strangers, in order to draw away the Flemings and Picards, who were brought into England by the wars of King Stephen. Others have thought, apparently with better reason, that it is an original branch of the *feudal law*, by which no one could hold lands without being obliged to fealty to him of whom they were holden, so that an alien who owed a previous faith to another prince could not take another oath of fidelity. Some restraints, however, have been laid upon aliens by the laws of almost all countries, as was done for example among the Romans. (Bac. Abr. Aliens, (C).)

2<sup>b</sup>. Rights to Real Property, ~~as~~ respects Aliens; W. C.

1<sup>a</sup>. Doctrine *at common law*; W. C.

1<sup>b</sup>. Disabilities of Aliens, at common law, as it respects lands.

Aliens, even *alien-enemies*, may *purchase* lands at common law (that is, acquire them by their own act, *e. g.* by *conveyance*, &c.), but cannot *hold* them, that is, they are liable to escheat to the Crown. But an alien cannot acquire lands by *descent*, or other operation of law (*e. g.* by dower or curtesy), because the law will not do so vain a thing as to cast the title upon one, in order to subject it immediately to escheat. The incapacity of aliens to *hold* is applicable, not only to estates of *freehold* (*i. e.* of indeterminate duration), but also to estates *for years*, save only that an alien engaged in trade might *hire a house for habitation*; but it is only a personal privilege in promotion of trade, so that, if he leave the kingdom, or die, the premises pass to the King, and not to his assignees, or personal representatives. The incapacity extends to *equitable*

as well as *legal* titles; and hence cannot be avoided by causing the conveyance to be made *to a trustee*, in trust for the alien. The mischiefs being the same, the trust-estate escheats to the crown, just as a legal estate would do.

It seems that at common law, if land were vested in an *alien trustee*, not only was the legal estate liable to escheat, but it escheated *discharged of the trust*, upon the frivolous technical reason that the Crown could not be *compelled* to execute the trust, and that, in case of escheat, the lord held *above the trust*, by a condition in law, tacitly annexed to the estate in its inception.

Since an alien cannot himself inherit, so neither can he transmit inheritance, whatever interest he may have being subject to the paramount right of escheat in the Crown. Hence, if the son be an alien, the native-born grandfather cannot transmit the inheritance to the native-born grandson, because it must come *through the son*, whose alienage arrests it. But if a father be an alien, and *two brothers* be native-born, the brothers may inherit one to the other, because (contrary to what was once thought) the descent is *immediate*, and not through the father. (1 Bl. Com. 372, & n (6) to (9); Bac. Abr. Aliens, (C); Id. Uses, (E) and (E), 1; Hubbard v. Goodwin, 3 Leigh, 508; Com. Dig. Alien, (C. 2) and (C. 3); 1 Tuck. Com. 65 & seq., B. I; Gilb. Uses, 43; Id. 204; Id. 10, & n (10); Id. 171-'2; 2 Fonbl. Eq. 139, n (a); Id. 167, n (a).)

2<sup>k</sup>. Reasons for the common law disabilities of Aliens.

1 Bl. Com. 372; Calvin's case, 7 Co. 18, b; Hubbard v. Goodwin, 3 Leigh, 510, 515;  
W. C.

1<sup>l</sup>. The alien would owe a divided allegiance or duty, partly to his own country, and partly to the country where the land is.

Such "half-faced fellowship" is undesirable to either country.

2<sup>l</sup>. The State might thereby be subjected to *foreign influence*, power being ever the concomitant of property.

*e. g.*, In the case of Poland. (1 Bl. Com. 372, n (8).)

3<sup>l</sup>. The State might be weakened by the diversion abroad of a large portion of the products of its soil.

3<sup>k</sup>. Escheat of lands acquired by aliens.

Whether the title be *legal* or *equitable*, it is liable,



as above stated, (*supra* p. 143, 1<sup>k</sup>.) to be escheated to the crown, but this can only be done by *office found*, (*i. e.*, by inquisition by a jury, as already explained, *ante* p. 131, &c. 2<sup>l</sup>.) or in case the title is *equitable*, by some equivalent proceeding in a *court of equity*, *e. g.*, by bill in equity, instituted in either case by the escheator, in the name of the Commonwealth. Until office found, &c., the alien is entitled to enjoy the profits, and to hold against the world, even against the Commonwealth itself. Nay, even after office found, if the possession *be vacant*, the Commonwealth must, by its officer, *enter upon the lands*, before the possession *in deed* can be adjudged in it. If the *possession be vacant*, there must still be *an office*, not indeed to *vest the right*, but the *possession*. (Hubbard v. Goodwin, 3 Leigh, 482; Com'th v. Martin's devisees, 5 Munf. 117; Craig v. Leslie, 3 Wheat. 589; Governor's heirs v. Robertson, 11 Wheat. 356; Fairfax v. Hunder, 7 Cr. 620; Page's case, 5 Co. 52; 1 Th. Co. Lit. 91, & n (9).)

2<sup>l</sup>. Doctrine *by statute*, in Virginia, touching Alien's rights to real property; W. C.

1<sup>k</sup>. Disabilities of Aliens, as respects lands, in Virginia.

The rigor of the common law has been gradually relaxed, as the importance of promoting immigration has been more appreciated, until at length it is provided that, "an alien, *not an enemy*, may acquire by purchase or *descent*, and *may hold*, real estate in this State; and the same shall be transmitted in the same manner as real estate held by citizens." (V. C. 1873, c. 4, § 18.) And by Article 9 of the treaty of 1794 with Great Britain, (*Jay's treaty*), it is stipulated that British subjects holding lands in the United States, and their heirs, so far as respects those lands, and the remedies incident thereto, shall not be *considered as aliens*, and conversely as to American subjects. (Stephen's heirs v. Swann, 9 Leigh, 444; Fiott & als v. Commonwealth, 12 Grat. 564; Orr v. Hodgson, 4 Wheat. 453; Shanks v. Dupont, 3 Pet. 242.)

By *statute*, the commonwealth is entitled to *equitable* interests acquired by aliens, in like manner as to *legal* interests; and on the other hand, the *mere legal* estate vested in an alien, by way of mortgage or in trust, is declared not to be liable to escheat. (V. C. 1873, ch. 109, § 25.)

With these qualifications the common law, as to



the disabilities of aliens, as it respects lands, prevails in Virginia.

2<sup>k</sup>. Escheat of lands acquired by aliens in Virginia.

The doctrine is the same as at common law, with the qualifications as to the disabilities of aliens. Stated *Supra*, 1<sup>k</sup>. See *Supra*, p. 145, 3<sup>k</sup>.

3<sup>1</sup>. Doctrine in England and in the United States, respectively, touching the rights to real property, of the subjects of the two countries, severally, in the other, after the revolution of 1776; W. C.

1<sup>k</sup>. The *period of separation* of these States from the mother country.

The United States reckon it to be 4th July, 1776, Great Britain 3d September, 1783, the date of the treaty of peace. (*Inglis v. Trustees of Sailor's Snug Harb.* 3 Pet. 99, 121; 2 Kent's Com. 59, 60.)

But it seems agreed that the treaty of peace of 3d of September, 1783, finally determined the allegiance of all persons as due to that party to which they were *at that time adhering*. (*Shanks v. Dupont*, 3 Pet. 243; *Kilham v. Ward*, 2 Mass. 236; *Gardner v. Ward*, Id. 244, note; *Doe v. Acklam*, 2 B. & Cr. 779; *Doe v. Mulcaster*, 5 Do. 771; 2 Kent's Com. 60.)

2<sup>k</sup>. The persons whose rights are concerned.

The persons whose rights are concerned are those born before the separation (*ante nati*), and not such as were born afterwards (*post nati*). (1 Tuck. Com. 60 to 62, B. I; 2 Kent's Com. 56, & seq.)

3<sup>k</sup>. The rights which are involved in the controversy.

Not rights *vested and existing* at the period of separation (which were in no wise affected by the mere change of political relations, however they may, in some instances, have been confiscated during the war of 1776 by *special legislative acts*), but rights to lands which accrued *by descent subsequent to the separation*, and which are not protected by the 9th Article of the treaty (*Jay's*) of 1794. (*Calvin's Case*, 7 Co. 27<sup>b</sup>; *Doe v. Acklam*, 2 B. & Cr. 779; *Terrett v. Taylor*, 9 Cr. 50; *United States v. Percheman*, 7 Pet. 56.)

The legislation of Virginia in regard to British aliens, pending the revolution, is stated in *Read v. Read*, 5 Call, 189; *Marshall v. Conrad*, Id. 364; *Com'th v. Bristow*, 6 Call, 6; *Hunter v. Fairfax's Devises*, 1 Munf. 218.

The 9th Article of the treaty with Great Britain, of 1794, was applicable to all the subjects of Great

Britain and the United States, at that time *holding* (*i. e.*, *having title* to) lands in either country, whether derived by *purchase or descent*, and confirmed such titles as if they had been respectively citizens; but it embraced only the subjects of the two countries, and applied only to titles *then existing*, and not to those *subsequently acquired*. (Harden v. Fisher, 1 Wheat. 300; Orr v. Hodgson, 4 Wheat. 453; Blight's Lessee v. Rochester, 7 Wheat. 353; Hughes v. Edwards & ux., 9 Wheat. 480; Fiott & als. v. Com'th, 12 Grat. 564.)

4<sup>k</sup>. The doctrine in respect to the rights involved in the controversy; W. C.

1<sup>l</sup>. The view of the Courts in the United States; W. C.

1<sup>m</sup>. As regards English *ante-nati*, claiming land in Virginia.

The view of the American courts was: such persons were not born *within the ligeance* of these States, which did not then exist as States, and therefore that such persons are aliens. (Read v. Read, 5 Call, 189; Hunter v. Fairfax' Devises, 1 Munf. 218; Dawson's Lessee v. Godfrey, 4 Cr. 321.)

2<sup>m</sup>. As regards American *ante-nati*, claiming lands in Great Britain.

The view was that, being born *within the ligeance* of the British Crown, they are entitled to inherit lands in Great Britain, in consequence of the common-law doctrine to which England is committed, that a man can never *put off his allegiance*, or be deprived of the benefit of it, save for a crime. (*Cases supra* 1<sup>m</sup>.)

As the American courts cannot be called to pronounce *directly* upon the titles to English lands, this latter view has always been merely speculative, and rather in the nature of an *argumentum ad hominem*, addressed to Great Britain. It seems to have yielded to the more reasonable doctrine stated *supra* 1<sup>k</sup>.

2<sup>l</sup>. The view taken by the Courts of England.

The English view is that, although the subjects of the two countries owed a common allegiance to the British Crown prior to the separation, and might mutually inherit; and although allegiance is indissoluble, *by the act of the subject alone*, yet there was never any doubt that subjects *might be discharged* by consent of the government; that the treaty of peace of 3d September, 1783, by recognizing the

independence of the United States, had determined the English citizenship of all who then adhered to those States; and that American *ante-nati* were thenceforward, like the *post-nati*, aliens to Great Britain, unless they manifested an election to be British subjects by forthwith leaving the United States, and coming to reside within the dominions of the mother-country. (Doe v. Acklam, 2 B. & Cr. 779; Doe v. Mulcaster, 5 B. & Cr. 771; Bac. Abr. Aliens (A).)

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## CHAPTER XI.

### OF THE CLERGY.

4°. The several Classes of the People in England, as *Clergy* or *Laity*; W. C.

1°. The *Clergy*.

Comprehending all persons in holy orders, and in ecclesiastical offices. (1 Bl. Com. 376, & seq); W. C.

1°. Archbishops,

Of Canterbury, and of York; the former styled "Metropolitan, and Primate of all England," and the latter "Primate and Metropolitan of England." They are called *archbishops*, in respect of the bishops under them, and *metropolitans* because they were consecrated at first in the metropolis of the *province*. The Archbishop of Canterbury has under him, in his province, twenty-one bishops of dioceses, and the Archbishop of York seven. The Archbishop of Canterbury has the precedency of all the clergy, and is the *first peer* of the realm. The Archbishop of York is next of the clergy, and has precedence also of all dukes not of the blood royal, and of all the great officers of the State, except the lord chancellor. (1 Bl. Com. 380, n's (9) and (10); W. C.

1°. Method of appointment of an Archbishop.

Elected by the *chapter of his cathedral-church*, by virtue of a licence from the Crown, which is accompanied by a royal letter-missive, *naming the person to be chosen*. The appointment is signified by the King's letters patent to the other archbishop and two bishops, or to four bishops, commanding them, without delay, to confirm, invest, and consecrate the person. (1 Bl. Com. 379-'80.)

2°. The Archbishop's rights and duties.

To inspect the bishops and inferior clergy of his province, and to "*deprive*" any of them for notorious cause; to assemble the clergy of his province in *convocation*, upon receipt of the King's writ; to have cognizance of appeals from inferior jurisdictions within his province; and the Archbishop of Canterbury has power to grant dispensations in any case not contrary to Scripture, (including special licences to marry at any *place or time*), where the Pope used to grant them; and *by custom*, to crown the Kings and Queens of the realm. (1 Bl. Com. 380-'81, and n (11) to (15).)

3<sup>d</sup>. The manner wherein the Archbishop's office may cease.

By death, deprivation for any very gross and notorious crime, and also by resignation, which must be to the *sovereign in person*, as his only superior. (1 Bl. Com. 382.)

2<sup>s</sup>. Bishops; W. C.

1<sup>d</sup>. Method of appointment of a Bishop.

Elected by the *chapter of his cathedral-church*, as in case of an archbishop. The appointment is signified by the King's letters-patent, to the archbishop, who must immediately confirm, invest, and consecrate the person elected. (1 Bl. Com. 379-'80.)

2<sup>d</sup>. The Bishop's rights and duties.

His functions, besides the administration of certain ordinances peculiar to his order, (*e. g. confirmation*), consist in inspecting the manners of the people and clergy of his diocese, and correcting what is amiss, by ecclesiastical censures. To this end, he may visit every part of his diocese, has *several courts* under him, presided over by his chancellor, and is assisted in his administration also, by his *arch-deacons, dean and chapter*, and *vicar-general*. He also institutes to all benefices in his diocese; consecrates churches; suspends and excommunicates evil-livers; and until recently, granted administration and probate of wills. This last function is now transferred to secular courts, called *courts of probate*, created for the purpose, by 20 and 21, and 21 and 22 Vict. (1 Bl. Com. 882, n (16) and (17); Williams on Pers'l Prop. 305, 328.)

3<sup>d</sup>. The manner wherein the Bishop's office may cease.

By death, by deprivation for any very gross and notorious crime, and also by resignation, which is to the *archbishop*, as his next superior. (1 Bl. Com. 382.)

3<sup>s</sup>. Dean and Chapter.

They are the bishop's *council*, to assist with their advice, in the ecclesiastical and secular concerns of the

see. They originated in the reservation of certain of the clergy, when the rest were settled in their several parishes, in order to celebrate Divine service in the bishop's cathedral. The chief of these had the name of *decanus*, or dean, being probably at first appointed to superintend *ten canons* or *prebendaries*. (1 Bl. Com. 382.)

W. C.

1<sup>h</sup>. Method of *appointment* of Dean and Chapter.

The chapter, consisting of *canons* or *prebendaries*, are sometimes appointed by the Crown, sometimes by the bishop, and sometimes elected by each other. The deans of the ancient chapters are elected by the chapter, upon a *conge d'elire* (or licence to elect), from the King, accompanied by letters-missive of recommendation, as in case of bishops; but in the modern chapters founded by Henry VIII, out of the spoils of the dissolved monasteries, (of which there are said to be thirteen), the deanery is *donative* (*i. e.* is merely in the gift of the Crown, without the intervention of any other authority), and the installation is simply in pursuance of the King's letters-patent. (1 Bl. Com. 382-'3, and n (19); 1 Th. Co. Lit. 98-'9, and n (7); 2 Bl. Com. 23.)

2<sup>h</sup>. The rights and duties of the Dean and Chapter.

They are the *nominal electors* of the bishop, and at common law their confirmation was necessary to his grants, although it is otherwise by 32 Hen. VIII, c. 28. (1 Bl. Com. 383.)

3<sup>h</sup>. The manner wherein the office of the Dean, and of any member of the Chapter, may cease.

By death, deprivation, resignation to the King or bishop, or becoming a bishop. (1 Bl. Com. 383.)

4<sup>h</sup>. Archdeacon.

He is a subordinate of the bishop, having a kind of episcopal authority over the whole, or some *peculiar part* of the diocese. (1 Bl. Com. 383);

W. C.

1<sup>h</sup>. Method of *appointment* of an Archdeacon.

Usually appointed by the bishop himself, or if by a *layman*, the bishop, upon presentation by the patron, *institutes* him, and the dean and chapter *induct* him. (1 Bl. Com. 383, and n (22).)

2<sup>h</sup>. The Archdeacon's rights and duties.

His authority, in modern times, is independent of and distinct from that of the bishop (although in theory the bishop's subordinate); and he therefore visits the clergy, and has his *separate court* for the

punishment of offenders by spiritual censures, and for hearing other ecclesiastical causes, but with an appeal to the bishop's court. (1 Bl. Com. 388; 3 Do. 64; 3 Steph. Com. 69.)

#### 5<sup>s</sup>. Rural Deans.

Ancient officers of the church, but now disused, although *deaneries* still subsist as an ecclesiastical division of territory. They were *deputies of the bishop*, who appointed them, in order to inspect the conduct of the parochial clergy, and examine candidates for confirmation, &c.; and were armed with an inferior degree of judicial and coercive authority. (1 Bl. Com. 383-'4.)

#### 6<sup>s</sup>. Parsons and Vicars of Churches; W. C.

##### 1<sup>h</sup>. Parsons.

The parson (*parsona ecclesiae*) is the *personification* of the visible church. He is a *sole body-corporate*, has perpetual succession, and enjoys *full possession of all the rights* of a parochial church; *e. g.*, glebe, parsonage, tithes, &c. (1 Bl. Com. 384, &c.)

W. C.

##### 1<sup>l</sup>. Method of *appointment* of Parsons.

Four requisites are *generally* necessary—viz: holy orders (as deacon or priest), presentation, institution, and induction. The *presentation* to the bishop may be by the lay-patron (when the *advowson* or right to present is said to be *presentative*); or the right may be in the bishop himself (when it is said to be *col-lative*); or, lastly, no presentation to the bishop may be required (in which case it is called *donative*). The *institution* is the acceptance of the candidate by the bishop himself; and *induction* is performed by a mandate from the bishop to the archdeacon, who usually commits it to another clergyman. (1 Bl. Com. 388 to 391.)

##### 2<sup>l</sup>. The rights and duties of Parsons.

They are entitled to the glebe, to the parsonage, to tithes, and other ecclesiastical dues; and it is their duty to *reside* in their parishes, and in the *parsonage* thereof; to perform divine service at the appointed times, and to instruct the people in religion; and to exercise the duties of hospitality. (1 Bl. Com. 391-'2.)

##### 3<sup>l</sup>. The manner wherein the Parson's office may cease.

By death, by deprivation, by cession in taking another benefice, and by consecration as a bishop; but it may be allowed *by dispensation*, to hold two or more benefices at once, *in commendam*—*i. e.*, as a living *commended* to a parson's care. (1 Bl. Com. 392.)

2<sup>h</sup>. Vicars.

When the benefice is perpetually annexed to some *spiritual corporation*, aggregate or sole, which has appropriated the glebe, tithes, and other dues, and employs some priest to perform the requisite parochial duties of a pastor, the person thus employed, or *substituted* (who receives for his compensation an agreed portion of the tithes), is called a *Vicar*. (1 Bl. Com. 388.)

The method of appointment of vicars, their duties and rights, and manner wherein the office may cease, are substantially the same as with parsons. (1 Bl. Com. 388 & seq.)

7<sup>s</sup>. Curates.

Temporary officiating ministers, in place of the proper incumbent, serving *for a stipend* paid by the parson or vicar who appoints him, the *amount* being settled by the ordinary. This is the lowest degree of the clergy, properly so called, the rest to be named being *ecclesiastical officers* only. (1 Bl. Com. 393-'4.)

8<sup>s</sup>. Churchwardens.

The guardians or keepers of the church edifice, and the representatives of the body of the parish. They are appointed, as the *custom* may direct, by the parson, or by the parish, or sometimes by both; and are a kind of corporation, being capable, by the name of *the church wardens of such a parish*, to take and hold *chattel-property*, and to bring actions. They have no *interest* in the church, church-yard, or glebe, all of which are vested in the parson, but their office is to repair the church and church-yard, (for which purpose they levy a *rate or tax*,) to compel the parishioners to attend church; and, in conjunction with the overseers, to take care of the poor, &c. (1 Bl. Com. 394-'5; Bac. Abr. Churchwardens.)

9<sup>s</sup>. Parish Clerks and Sextons.

Appointed generally by the parson, but by custom may be chosen by the inhabitants. Parish clerks were formerly clerks *in orders*, but in modern times are *laymen*. Their principal business is to make the responses in the service; to read the lessons; to sing, or lead in the singing of the psalms and hymns, &c.

Sextons, or *sacristans*, (from the old words, *segsten*, *segerstane*, the keeper of holy things,) are employed to attend the church building, and keep it in fit condition; to ring the church bell, &c. (1 Bl. Com. 395; Jac. L. Dict'y, *Parish Clerks* and *Sacristan*.)



## CHAPTER XII.

### OF THE CIVIL STATE.

#### 2<sup>r</sup>. The Laity.

Such of the people as are not comprehended under the designation of *Clergy*, may be divided into three distinct states, the *Civil*, the *Military*, and the *Maritime*. (1 Bl. Com. 396.)

W. C.

#### 1<sup>s</sup>. The Civil State.

It consists of the nobility and the commonalty. (1 Bl. Com. 396.)

W. C.

#### 1<sup>h</sup>. The Nobility.

The King is the fountain of honor, and may institute and confer titles at his pleasure. Those at present in use are of unequal antiquity. They are dukes, marquises, earls, viscounts, and barons; all of whom, though differing in degree amongst themselves, yet as compared with the commonalty, are *equals*, and so are styled *peers*. (1 Bl. Com. 396.)

W. C.

#### 1<sup>i</sup>. The several ranks of Nobility; W. C.

##### 1<sup>k</sup>. Dukes.

This title, though inferior to some in antiquity, is superior to all in rank, being the first in dignity after the royal family. Among the Saxons, it was frequent, under the appellation of *herezoga*, corresponding to the Latin *duces*, leaders of armies. After the Norman conquest, the Kings of England, being themselves Dukes of Normandy, would not honor any *subject* with the title of Duke, until Edward III created his son, Edward the Black Prince, Duke of Cornwall; and many of the royal family had afterwards similar honors bestowed on them. In the reign of Elizabeth, the title became extinct, but was revived by her successor, James I, in the person of his favorite, George Villiers, whom he created Duke of Buckingham. (1 Bl. Com. 397.)

##### 2<sup>k</sup>. Marquis.

His office (for dignity and duty formerly went together), was to guard the frontiers (*marches*), of the kingdom, and therefore he was styled a *lord marcher*, or *marquis*. (1 Bl. Com. 397.)

##### 3<sup>k</sup>. Earl.

A title so ancient that its original is not traceable. By the Saxons, a person of this dignity was called *ealderman*, (equivalent to *senior*, or *senator*,



amongst the Romans); and also *schire-man*, because he had charge of a *shire* or county. The Danes changed the designation to *eorle*, which seems in their language to have had a like meaning. In Latin he is called *comes*, as being the King's attendant, and in French, *count*, whence his shire was called *county*, the present chief-officer thereof being called, as has been seen, *vice-comes*, as having been originally the deputy of the *comes*. The name, *earle*, is now a *mere title*, wholly disconnected from any office or jurisdiction whatsoever. (1 Bl. Com. 398.)

4<sup>k</sup>. Viscount.

In Latin, *vice-comes*, was made an *arbitrary title* of honor, without any pretence of office attached, 18 Hen. VI, (A. D. 1440). (1 Bl. Com. 398.)

5<sup>k</sup>. Baron.

The most universal title of nobility, originally annexed to all the superior ranks of the peerage, but in process of time separated from them, by being limited to different lines of heirs. Barons are supposed to have corresponded originally with the *lords of manors*, whence the manorial court is styled the *court-baron*. (1 Bl. Com. 399.)

2<sup>l</sup>. Modes of creating Peers.

By *writ*, or by *letters-patent*, actual, or presumed from prescription;—by *writ*, which is a King's letter, summoning one to attend the House of Peers, by the style and title which the King is pleased to confer;—by *letters-patent*, whereby the dignity enures to a man and his heirs, or for life, according to the limitation contained therein. (1 Bl. Com. 400.)

3<sup>l</sup>. Principal incidents attending Nobility.

Besides being a member of parliament, and an hereditary counsellor of the Crown, a nobleman is entitled to be tried upon criminal charges—at least for treason or felony—by his *peers*; cannot be arrested in civil cases; answers bills in equity upon his *honor*, not upon oath; when sitting in judgment, gives his verdict, not on oath, but *on his honor*; and is entitled to have those who malign him punished with peculiar severity, as guilty of *scandalum magnatum*. (1 Bl. Com. 402.)

4<sup>l</sup>. Modes whereby a peer may lose his nobility.

Only by his death, by attainder, or by act of parliament. (1 Bl. Com. 402.)

2<sup>h</sup> The Commonalty.

Like the nobility, the commonalty is divided in-

to several degrees, yet all commoners are in law *peers* (or equals), in respect to their want of nobility. (1 Bl. Com. 403.)

W. C.

1<sup>1</sup>. Vi-dame (*vice-dominus*), or Valvasor.

An order quite out of use, and their original, or ancient office, not understood. (1 Bl. Com. 403; Id. 347, n (23).)

2<sup>1</sup>. Knights of various names and ranks.

Knights are called in Latin *equites aurati*, because they served on horse-back, and wore *gilded* spurs. In English law, they are styled *milities*, because of the military service to which their feudal tenures obliged them. Every one who held a *knight's fee* (according to some 680, or to others 800 acres, but more probably of the *annual value*, in the time of Ed. I, of £20, 1 Th. Co. Lit. 210-'11), was obliged, by the feudal law, to be *knighted*, or pay a fine to the King, an old usage which Charles I, gave great offence by attempting to revive. (1 Bl. Com. 404.)

W. C.

1<sup>k</sup>. Knights of the order of St. George, or *of the Garter*.

Instituted by Edward III (A. D. 1349). (1 Bl. Com. 403; 1 Rap. Eng. B. X.)

2<sup>k</sup>. Knight-banneret.

Apparently so called because originally created by the King in person on the field, under the *royal banners*, in time of war. (1 Bl. Com. 403.)

3<sup>k</sup>. Baronet.

Instituted by James I (A. D. 1611), to raise a competent sum (the *honor being sold!*), to defray the charges of reducing the province of Ulster, in Ireland. (1 Bl. Com. 403.)

4<sup>k</sup>. Knights of the Bath.

So called from the ceremony of *bathing* the night before creation. Instituted by Henry IV, and revived by George I. (1 Bl. Com. 404.)

5<sup>k</sup>. Knight-Bachelor.

The most ancient, and yet the lowest order of knighthood. It is at least as early as the time of Alfred, who conferred it on his son Athelstan. (1 Bl. Com. 404.)

3<sup>1</sup>. Names and titles of worship, not of dignity.

*e. g.*, Gentleman, Esquire, Yeoman, &c. (1 Bl. Com. 405-'6.)

4<sup>1</sup>. Tradesmen, Artificers, and Laborers.

These designations seem to be resorted to to identify more certainly the person intended in legal, and especially in *criminal* proceedings. (1 Bl. Com. 407.)

## CHAPTER XIII.

## OF THE MILITARY AND MARITIME STATES.

2<sup>s</sup>. The Military State.

This includes the whole of the soldiery, or persons peculiarly selected and set apart for the defence of the realm. (1 Bl. Com. 408 & seq.; 2 Steph. Com. 594 & seq.);  
W. C.

1<sup>b</sup>. Dangers of standing armies to a free State.

In absolute monarchies, which govern principally by fear, standing armies are a necessary element; but in free States, the profession of a soldier is justly an object of jealousy. No man ought to take up arms, except to defend his country, or to vindicate its laws; and when he becomes, for a time, a soldier, he ceases not thereby to be a citizen. Accordingly, the common law knows no such state as that of a *permanent soldier*, and makes no provision for it. It was not until the reign of Henry VII, that the Kings of England had so much as a guard about their persons. (1 Bl. Com. 408.)

2<sup>b</sup>. Arrangements for national defence amongst the Anglo-Saxons; W. C.1<sup>i</sup>. Arrangements amongst the ancient Germans.

Cæsar and Tacitus relate that the Germans had *Dukes*, elected by the people for their warlike prowess, who *commanded their armies* in war, and *Kings*, who were *hereditary*, to conduct their *civil affairs*. The forces seem to have consisted of the *body of the population*. (1 Bl. Com. 409.)

2<sup>i</sup>. Arrangements perfected by Alfred.

The military force of the kingdom was in the hands of the dukes or *heretochs*, who were constituted for every county of the principal nobility, and such as were most remarkable for being "*sapientes, fideles et animosi*." They were chosen, like the sheriffs, by the people of the county in full assembly (*folk-mote*), according to that fundamental maxim of the Saxon constitution, that any officer entrusted *with power susceptible of abuse*, and of being perverted to oppress the people, should be chosen by the people themselves. The dukes, however, seem to have possessed a power too independent of the throne, whereby they were occasionally tempted, and enabled, to accomplish the subversion of the royal authority, and even the usurpation of the Crown, as in

case of Duke Harold, upon the death of Edward the Confessor. (1 Bl. Com. 408 to 410.)

- 3<sup>h</sup>. Arrangements for national defence *after the Norman conquest*; W. C.

- 1<sup>l</sup>. The feudal provision for national defence.

With the Conquest, or at least in consequence of it, the *feudal law* was introduced into England in its rigor, the whole system being on a military plan. The kingdom was divided into *knight's fees*, in number above 60,000, for each of which a soldier was bound to attend the King in war, for not exceeding *forty days* in the year, a term which it was supposed would decide the campaign, and probably the war. In process of time this personal service was exchanged for *pecuniary commutations*, and finally the military part of the system was abolished by Stat. 12 Car. II, c. 24. (1 Bl. Com. 410.)

- 2<sup>l</sup>. Supplemental provisions for national defence by early statutes.

Besides this feudal array, the statutes of 27 Hen. II, (A. D. 1131), and 13 Edw. I, c. 6, (A. D. 1278), aided by subsequent statutes, obliged *every man* to provide himself with suitable arms, in order to keep the peace, but with the *proviso*, that he should not be compelled to go *out of the realm* at any rate, nor *out of the shire*, save in case of urgent necessity. Under these statutes it was usual for the Crown, from time to time, to issue *commissions of array*, and to send into every county officers who could be confided in, to muster, and set in military order, the inhabitants of every district; and about the time of Henry VIII, *lieutenants* were introduced as *standing representatives* of the Crown, to keep the counties in military order, whereby the old commissions of array fell into disuse.

These old statutes were all repealed by Stat. 1 Jac I, c. 25, and 21 Jac. I, c. 28 (A. D. 1603 and 1624), and the national defence was left as at common law. (1 Bl. Com. 411.)

- 3<sup>l</sup>. Disputes between Charles I and parliament, as to the control of the militia.

Parliament (that is, the *Lords and Commons*), not only denied the control of the militia to the King, as his common-law prerogative, (in which they seem to have been right), but asserted it to be *in the two houses*,—a proposition which, as the two houses, without the King, do not constitute the parliament proper,—i. e. the national legislature,—appears to

be untenable. This dispute, it will be remembered, was the immediate cause of the final rupture. (1 Bl. Com. 411-'12; 2 Rap. Eng. 422, c. xx, (A. D. 1641-'2.)

4<sup>b</sup>. Modern provisions for the national defence; W. C.

1<sup>1</sup>. Provisions to make the public force available; W. C.

1<sup>k</sup>. The Militia-force.

After the restoration, by Stats. 13 Car. II, c. 6; 14 Car. II, c. 3; and 15 Car. II, c. 5, (A. D. 1662 to 1664), the sole right of the Crown was recognized to *govern and command* the militia, as well as to *organize it*; and these statutes are the foundation, and contain the substance, of many subsequent acts for the same purpose. (1 Bl. Com. 412, and n (14); 2 Steph. Com. 598-'9.

W. C.

1<sup>1</sup>. The compulsory levy of Militia.

A certain number of the inhabitants of every county are chosen by lot, for five years, and officered by the lord-lieutenant of the county, and other principal landholders, under a commission from the Crown, and are disciplined at stated periods, for the internal defence of the country. They are not compellable in any case to go *out of the realm*, nor *out of the county*, unless in case of invasion, or actual rebellion. (1 Bl. Com. 412; 2 Steph. Com. 599.)

2<sup>1</sup>. The Volunteer Militia.

Originated in the menace of French invasion, in 1803, and is now, for the most part, laid aside, although the laws for its regulation are still unrepealed. (2 Steph. Com. 599.)

2<sup>k</sup>. The *standing forces*.

The occasions of war, especially of *aggressive war*, require soldiers more completely and permanently disciplined than militia, and not restricted as to the *field service*. The military establishment of Great Britain, therefore, comprises, even in peace, a large body of regular forces, who are under the command of the Crown. (1 Bl. Com. 413.)

2<sup>1</sup>. The provisions to prevent the military force of the country from being dangerous.

It can be embodied and governed only in pursuance of an act of Parliament, which is known as the *mutiny act*, and is *annually* enacted, so that the whole army is *ipso facto* disbanded at the end of every year, unless continued by parliament. This annual statute clothes the King with power to make laws, (called

the *Articles of War*,) for the government of the soldiers, and of the militia, and to convene *courts-martial*, with jurisdiction to try and punish offences according to the Articles of War, and the provisions of the act. Without the mutiny act, the soldiers could only be proceeded against according to the common law, that is *by action* for not fulfilling their contract of enlistment, and by prosecution for *assault and battery*, for beating their officers, which, of course, would put an end to all discipline. This obstacle it was which prevented James II from establishing a standing army, and governing by means of it, as he had designed to do. (1 Bl. Com. 413 & seq; 2 Steph. Com. 600.)

This martial law which is thus applied by the potency of an act of parliament, is viewed with great jealousy, and is rigorously confined to persons in *military service*, either as regular soldiers or as militia. (2 Steph. Com. 602.)

### 3<sup>d</sup>. Provision for disabled soldiers.

Pensions are provided for the sick, hurt, and maimed; and for such as are worn out in their duty, the royal hospital at *Chelsea*, &c. (1 Bl. Com. 417; 2 Steph. Com. 602-'3.)

### 2<sup>d</sup>. The Maritime State.

This includes the persons employed in the royal navy, which has ever been the chief defence and ornament of Great Britain, and as such has been assiduously cultivated from a very early period. So eminent was the naval reputation of England in the twelfth century, that the marine code, known as "*laws of Oleron*," which was compiled by Richard I of England, (about A. D. 1194,) at the Isle of Oleron, on the coast of France, then part of the possessions of the English crown, was speedily received by all Europe, and now constitutes the ground of all their maritime constitutions. (1 Bl. Com. 418; & n (13); 1 Th. Co. Lit. 9, 48; Bac. Abr. Court of Adm. (E).)

W. C.

### 1<sup>h</sup>. The naval power of England, cherished and enlarged by the navigation acts.

By these acts the constant increase of mercantile shipping and seamen was immensely and unavoidably promoted, the trade of the country, and especially of the colonies, being thereby more or less *restricted to English ships*, manned chiefly by *English crews*. (1 Bl. Com. 418-'19, & n (14), &c.)

2<sup>b</sup>. Modes adopted to supply the Royal Navy with seamen.

The supply is kept up, not by *voluntary enlistments* alone, with many advantages of wages, but also by *impressments*, in pursuance of royal commissions, (which, though much complained of, have been adjudged, upon the plea of necessity, to be in accordance with the common law,) and by authorizing parishes to bind poor boys apprentices to masters of merchant vessels. (1 Bl. Com. 420-'21; 2 Steph. Com. 604-'5.)

3<sup>b</sup>. Laws to enforce Naval Discipline.

The rules and articles of the naval service, whereby persons connected with it are governed, are set down in certain *permanent acts of parliament*, and are not left, as in case of the army, to executive discretion, under an annual mutiny act. (1 Bl. Com. 421; 2 Steph. Com. 605-'6.)

4<sup>b</sup>. Privileges conferred on sailors.

Nearly the same as on soldiers; *e. g.*, pensions to the maimed, wounded or superannuated, and a refuge in the royal hospital at *Greenwich*, &c. (1 Bl. Com. 421; 2 Steph. Com. 607.)

## CHAPTER XIV.

### OF MASTER AND SERVANT.

2<sup>c</sup>. The Private Relations, and the rights and consequent duties belonging thereto.

The private relations are those of (1), Master and servant; (2), Husband and wife; (3), Parent and child; and (4), Guardian and ward;

W. C.

1<sup>d</sup>. Master and Servant; W. C.

The relation of master and servant, in its proper and more comprehensive sense, pervades the whole of society, and demands careful consideration. The subject may be presented under the heads following, namely: (1), The definition of a master and of a servant; (2), The several classes of servants; (3), The manner in which the relation of service affects master and servant respectively; (4), The manner in which strangers may be affected by the relation; and (5), The doctrine touching the termination of the relation; (6), The doctrine touching the liability of a master where *government* is



concerned; (7), The doctrine touching the liability of an employer for the acts and defaults of a *contractor*; and (8), The doctrine touching the liability of the owner of real property for its use for hurtful purposes;

W. C.

1°. Definition of a Master, and of a Servant.

A master is one who exercises personal authority or control over another, and that other is his servant. (1 Pars. Con. 86-'7.)

2°. The several classes of servants; W. C.

The several classes of servants include (1), Slaves; (2), Menial servants; (3), Apprentices; (4), Laborers; and (5), Stewards, bailiffs, factors, agents, &c.;

W. C.

1<sup>st</sup>. Slaves.

Slavery is properly a *state of involuntary servitude for life*. The extent of the master's authority is greater or less, according to the municipal law of each country where such a system prevails. It was never understood in Virginia to confer on the master, as it did by the Roman law, absolute and unlimited power over the *life and limbs* of the slave, and for a century past has been with us little more than an apprenticeship for life, with power in the master to assign it at pleasure.

Slavery existed in England, at common law, under the name of *villénage*; and that country for a century and a half was the great patron of the *African slave-trade* (the most monstrous wickedness of modern times), and continued it for nearly thirty years after it had been *abolished by Virginia*. (1 Th. Co. Lit. 405 & seq.; 1 Hargr. Jur. Exerc's 18 & seq.; Bract. Lib. IV, fol. 208; Somerset's Case, Lofft's Rep. 1, 17; S. C. 20 How. St. Tri. 1; 1 Rob. Pr. (2d Ed.), 18, &c.)

The growing density of her population having made it more profitable to *hire laborers* than to *own* them, villénage sunk gradually into disuse, and the English people (like some of our own countrymen), mistaking the promptings of *interest* for those of *moral principle*, as men are prone to do, have loudly applauded their own philanthropy, and have been fain to atone to the world for their very active participation in the worst incidents of slavery, by remorseless abuse of Virginia for continuing to tolerate what *they would not allow her to prevent*.

We may note, (1), The origin of slavery in general; (2), The origin of slavery in Virginia, its justification, and its history here; (3), Slavery in its relation to the world; and (4), Who shall be deemed a *negro* or *colored person* in Virginia;



W. C.

1<sup>st</sup>. The Origin of Slavery in general, and objections thereto; W. C.

1<sup>st</sup>. Origin of Slavery.

Slavery, which seems to be well nigh as ancient as human society, is referred by Justinian to three sources, viz., captivity in war, purchase for a price, and birth of a slave mother. *Servi aut nascuntur aut fiunt. Nascuntur ex ancillis nostris; fiunt aut jure gentium, id est, ex captivitate; aut jure civili.* (1 Th. Co. Lit. 403-'4; Gen. ix. 10, 11; Just. Inst. Lib. I, Tit. iii, § 4.)

2<sup>nd</sup>. Objections to the validity of these sources of slavery.

Blackstone very justly observes that the three origins of the right of slavery, assigned by Justinian, are all of them built upon false foundations. As first, *jure gentium*, from captivity in war; as if the conqueror, having spared the life of his captive, has a right to deal with him as he pleases. But war is itself justifiable only on principles of self-preservation, and therefore gives no other right over prisoners, but merely to disable them from harming us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even to enslave an enemy, *when the war is over*.

But secondly, as to slavery beginning *jure civili*, when one man sells himself to another; if this is meant only of contracts to serve or work for another, it is very just; but when applied to strict slavery, where the bondsman becomes the property of the master, it is repugnant to sense and reason. Every sale implies a price, an equivalent, or what may possibly be an equivalent to the seller in lieu of what he parts with; but what can possibly be an equivalent for one man's thus surrendering himself up to the absolute disposal of another during his whole life, as his property?

Lastly, if slaves cannot be *made*, either *jure gentium*, from captivity in war, nor *jure civili*, by purchase for a price, it is manifest that no one can be a slave *by birth*. (1 Bl. Com. 423; Montesq. Sp. L., B. XV, c. 2; Vat. B. III, § 152; 1 Hargr. Jur. Ex. 12 & seq.) In its *origin*, therefore, slavery cannot be justified; but when once instituted, and when slaves constitute a considerable part of the population of a State, the continuance of the institution may, and generally will become a necessity, because more injury would result to the body politic from its precipitate abolition than from its maintenance.

2<sup>g</sup>. The Origin of Slavery in Virginia, its justification, and its history there.

We are to take notice in this connexion of, (1). The origin of slavery in Virginia; (2), The justification of slavery in Virginia; (3), The history of slavery in Virginia; and (4), Slavery in its relations to the Federal government;

W. C.

1<sup>h</sup>. The Origin of Slavery in Virginia.

In August, 1620, says Beverly, a Dutch man-of-war landed *twenty negroes* for sale, which were the first of that kind that were carried into the country. (Bev. Va. 35; 1 Rob. Pr. (2d Ed.) 15 & seq.)

2<sup>h</sup>. The Justification of Slavery in Virginia.

The continuance of slavery in Virginia was justified by an inexorable *political necessity*. It was imposed on the colony, in the first instance, against the earnest and oft-repeated protests of the General Assembly, by the negatives of the King of England, or of his governors, on the laws enacted to prohibit the importation of and traffic in slaves; the further importation was forbidden under heavy penalties, within two years after our declaration of independence (*i. e.*, in 1778), almost *thirty years* before it was prohibited by Great Britain, and before New England would consent entirely to forego its profits, by allowing the United States to prohibit it; Virginia being thus the *first country* in the world to set the seal of reprobation upon that *opprobrium of modern civilization*, the African slave-trade; and when, at length, the commonwealth acquired the power to direct her own policy, the number of slaves was so great (exceeding 230,000) as compared with the whites (about 360,000) as to make it alike disastrous to both races to liberate the blacks. (1 Tuck. Com. 75; Dew's Essay on Slavery, 76, & seq.; 3 Ell. Deb. 590, Speech of P. Henry.)

3<sup>h</sup>. History of Slavery in Virginia.

The history of slavery in Virginia may be briefly presented under the heads following, namely:

- (1). The first progress of slavery in Virginia;
- (2). Efforts of Virginia to arrest the importation of slaves.
- (3). Prohibition of the slave-trade in Virginia;
- (4). What persons were capable of being enslaved;
- (5). Legislation in Virginia touching the rights of master to slaves;
- (6). Penal legislation in Virginia touching slaves;
- (7). Manumission of slaves by the owner;

(8). Doctrine as to the liability of the hirer of a slave;

(9). What persons were slaves in Virginia at the date of the abolition of slavery;

(10). Propositions from time to time for general emancipation;

(11) Alarms of servile insurrection in Virginia;

(12). The abolition of slavery in Virginia;

(13). The measure of recovery in controversies touching slaves detained or converted prior to abolition;

(14). Doctrine as to the validity and effect of bonds and notes for slave purchases, &c.;

W. C,

# 1<sup>st</sup>. The First progress of Slavery in Virginia.

Having originated, as already stated, in 1620, its progress was at first so slow that, in 1671, Sir William Berkeley, then governor, states the slaves to be only 2,000, out of an entire population of 40,000, and says the importation did not exceed two or three cargoes in seven years. (2 Hen. Stats. 215.)

# 2<sup>nd</sup>. Efforts of Virginia to put a stop to the importation of slaves.

In 1699 the General Assembly commenced the series of prohibitory acts (as many as *twenty-three* in all), by which it sought to arrest or discourage the further introduction of slaves, the last being in 1772, which was accompanied by an earnest petition to the throne to "*remove all restraints which inhibited his majesty's governors assenting to such laws as might check so very pernicious a commerce as that of slavery.*"

(1 Tuck. Bl. App'x 51, *note.*) This reasonable petition, like its predecessors, was disregarded; and it serves to shew the depth of the general sentiment upon the subject, that the preamble of the Constitution of 1776 (which has also been the preamble of every succeeding Constitution, as it is of the present one) complains of it as one of the acts of "detestable and insupportable tyranny" of the King of Great Britain, that he had prompted our negroes to rise in arms among us,—"*those very negroes whom, by an inhuman use of his negative, he had refused us permission to exclude by law.*" (V. C. 1873, p. 66; 3 Ell. Deb. 452, 454; Va. Const. 1869, *Preamble.*)

# 3<sup>rd</sup>. Prohibition of the slave-trade, by Virginia.

In October, 1778, an act was passed prohibiting the importation of slaves by *land or water*, under the penalty of £1,000 each, and freedom to the slave; thus

giving to the world the *first example* of abrogating this most wicked and pernicious traffic. (9 Hen. Stats. 471.)

4<sup>1</sup>. What persons were capable of being enslaved.

No other persons than *negroes and their descendants* were ever slaves in Virginia, except that, in pursuance of several acts of Assembly, from 1676 to 1682, *Indian* captives were for a few years reduced to a like condition; which state of things, however, ceased in 1691 (or, as some say, in 1705), in consequence of an act authorizing a "*free and open trade*" with all Indians whatsoever. (1 Tuck. Bl. Pt. II, App'x 47; 2 Hen. Stats. 346, 404, 440, 491; 3 Hen. Stats. 69, 447; Robin v. Hardaway, Jeff. Rep. 109; Pallas, &c., v. Hill, &c., 2 Hen. & M. 149; Gregory v. Baugh, 4 Rand. 623, 625, &c.; S. C. 7 Leigh, 681, 684.)

5<sup>1</sup>. Legislation in Virginia, touching the rights of masters to slaves; W. C.

1<sup>k</sup>. Legislation touching the effect of *baptism of slaves*.

It having been adjudged in England, in 5 W. & M., (A. D. 1693), that an action of *trover* lay to recover the value of negro-slaves, "*because they are heathen, and a man may have property in them,*" (Gelly v. Cleve, 1 Lord Raym. 147), a popular inference arose that if negroes became *Christians*, the right of property would cease. The Colonial Assembly of Virginia, therefore, enacted in 1705, that if *not Christians in their native country*, nor Turks, nor Moors, in amity with England, it should not prevent their continuing to be slaves, that they were *converted to Christianity*, after they were shipped for importation. (3 Hen. Stats. 447-'8; 5 Do. 548.) And in a like spirit of caution, it was enacted, in 1753, that "*baptism of slaves doth not exempt them from bondage.*" (6 Hen. Stats. 357.)

2<sup>k</sup>. Legislation touching the effect of a slave's being carried to England.

Lord Holt having held (at some time between 1688 and 1705), that as soon as a negro sets his foot in England, he is immediately, and *ipso facto*, free (Smith v. Brown & Cooper, 2 Salk. 666), the Virginia Assembly enacted, in 1705, that a slave *having been in England* shall not be sufficient to discharge him from slavery in Virginia, without proof of his having been actually manumitted there. (3 Hen. Stats. 447; 5 Do. 548; 6 Do. 357.)

6<sup>1</sup>. Penal legislation in Virginia, touching slaves.

It was generally conceived in a humane spirit, bu

in some particulars evinced in early times a severity and harshness, in remarkable contrast with the later periods of the institution.

W. C.

- 1<sup>k</sup>. Act of 1669, touching the killing of a slave by his master, or overseer, whilst under correction.

It was enacted that the master or overseer should be "acquitted of molestation," "since it cannot be presumed," says the statute, "that prepensed malice should induce any man to *destroy his own estate*." (2 Hen. Stats. 270; Exod. xxi. 20, 21.)

This law, after having been several times re-enacted, was, in 1788, in consequence of an instance of revolting cruelty in a master, repealed, and thenceforth the killing or maiming of a slave was upon the same footing as if committed upon a white freeman. (12 Hen. Stats. 681; 1 Tuck. Bl. 56, and note\*.)

- 2<sup>k</sup>. Act of 1705, to punish slaves notoriously and incorrigibly addicted to *going abroad at night, and running away*.

They were to be "*dis-membered*," or otherwise punished at the *discretion of the county court, saving life*. (3 Hen. Stats. 461.)

But by act of 1769, this was said to be disproportioned to the offence and *barbarous*, so that the despotic discretion of the county court was somewhat restricted. (8 Hen. Stats. 358.)

- 3<sup>k</sup>. Act of 1748, empowering two justices of the peace to *outlaw* runaway slaves, lurking in swamps, and stealing hogs, &c.

Slaves thus *outlawed* were liable to be *destroyed by any ways or means*, and their value, in such case, was paid out of the *public treasury*. (6 Hen. Stats. 110-11; Bland papers, p. 17.)

This extravagantly inhuman statute was repealed in 1792.) (1 Stats. at large, (N. S.), 125.)

- 4<sup>k</sup>. The Statute punishing *cruelty to a beast*, (V. C. 1873, c. 192, § 15), did not punish the *cruel, wanton, and malicious beating* of a slave, by his master.

If neither *death nor mayhem* ensued, the law inflicted no punishment, but left the offender to the "deep and solemn reprobation of the tribunal of public opinion." (Turner's Case, 5 Rand. 686.) However, in Souther's Case, (7 Grat. 681), it was held that homicide committed by excessive whipping of a slave, such as was calculated to produce

death, was *murder in the first degree*, without regard to the *offender's intention*.

7<sup>1</sup>. Manumission of Slaves by the owner; W. C.

1<sup>k</sup>. State of the law previous to 1723.

Manumission was uncontrolled and unregulated, save that the master was required to provide the means of transportation for his manumitted slave out of the country. (3 Hen. Stats. 87.)

2<sup>k</sup>. State of the law from 1723 to 1782.

Manumission during this period was wholly prohibited, except for *meritorious services*, to be adjudged by the governor and council. (4 Hen. Stats. 132 )

3<sup>k</sup>. State of the law from 1782 to the abolition of slavery in 1865.

Manumission, from 1782 to 1865, was freely permitted, with no other qualification than that it should not be to the prejudice of the master's creditors, nor to the detriment of the parish, by throwing upon it one likely to become chargeable as a *pauper*. (11 Hen. Stat. 39; V. C. 1860, ch. 103, § 17 to 19.)

In order to develop the principles applicable to the subject, we must observe, (1), The mode of manumission; (2), The effect of a condition annexed to manumission; (3), The doctrine as to the status of the issue of a female emancipated, to take effect at a future time; (4), The doctrine as to allowing slaves an election to be free; (5), The doctrine as to the power of slaves to make contracts; (6), The doctrine as to the mode of a slave recovering freedom; and (7), The doctrine as to the right of a slave recovering his freedom to recover damages; W. C.

1<sup>1</sup>. The mode of manumission.

By last *will* (in *writing*, since 1850) or by *deed* recorded in the clerk's office of the county or corporation court of the county or corporation wherein the master resided, as deeds of lands are required to be recorded. (V. C. 1860, ch. 103, § 16; Id. ch. 121, § 2, 3; Givins & als v. Manns, 6 Munf. 191; Manns v. Givins & als, 2 Leigh, 762; S. C. 7 Leigh, 689; Thrift v. Hannah, 2 Leigh, 300; Lewis v. Fullerton, 1 Rand. 15.)

2<sup>1</sup>. Effect of condition annexed to manumission, &c.

A condition *precedent* was valid, and must have been complied with; a condition *subsequent* was void. (Hepburn v. Dundas, 13 Grat. 222; For-

ward's Adm'r v. Thamer, 9 Grat. 539; Osborne & als v. Taylor's Adm'r & als, 12 Grat. 128.)

- 3<sup>1</sup>. Doctrine where female slave was emancipated, to take effect at a *future time*, as to the *status* of the issue born prior to that period.

The courts held the issue to be slaves for life, but by *statute* it was enacted that they should be free at the *same period with the mother*. (Maria v. Surbaugh, 2 Rand. 229; Taylor v. Cullina, 12 Grat. 394; V. C. 1860, ch. 103, § 17.)

- 4<sup>1</sup>. Doctrine as to the effect of allowing to slaves an *election to be free or not*.

No doubt seems to have been entertained until 1858 of the validity of such a provision (*e. g.*, contained in a will); and that it was competent for slaves to make such election to be free, or otherwise. (Pleasants v. Pleasants, 2 Call. 319; Elder v. Elder's Ex'or, 4 Leigh, 252; Dawson v. Dawson's Ex'or, 10 Leigh, 602.)

But in 1858 it was held, in two cases (contrary, it is believed, to the general sentiment of the profession), that slaves had no *legal capacity to choose*, even to be free, and therefore that allowing them such choice was merely vain and inoperative, neither emancipating them nor putting it in their power to be emancipated. (Bailey & als v. Poindexter's Ex'ors, 14 Grat. 132; Williamson & als v. Coalter's Ex'ors, & als, Id. 394.)

- 5<sup>1</sup>. Doctrine as to the power of slaves *to make contracts*.

It is agreed that they have no such power. Hence, the marriages of slaves are void. So also are their contracts with the *master* to buy themselves, although part, or even the whole, of the purchase money has been paid. But a contract by the master with a *third person* to liberate the slave upon a contingency would probably be valid, and would be enforced in equity at suit of such third person. (Sawney v. Carter, 6 Rand. 173; Stevenson v. Singleton, 1 Leigh, 172; Bailey & als v. Poindexter's Ex'ors, 14 Grat. 193; Shue v. Turk, 15 Grat. 266, 267-'8.)

- 6<sup>1</sup>. Doctrine as to the mode whereby one held as a slave might *recover his freedom*.

He might sue *in forma pauperis*, in the manner prescribed by the Statute, (V. C. 1860, ch. 106, § 1 to 7), and *not otherwise*, but where there were impediments to a fair trial *at law*, resort might be had, as in other cases, to *Equity*. And so slaves

emancipated by will, might propound it for *probat*. (Isaac v. Johnson, 5 Munf. 95; Lemon v. Reynolds Adm'r, &c. Id. 532; Dempsey v. Lawrence, Gilm. 383; Talbert &c. v. Jenny &c., 6 Rand. 162; Dunn v. Amey & als, 1 Leigh 465; Anderson's Ex'ors v. Anderson, 11 Leigh 616; Jincey & als v. Wingfield's Adm'r & als, 9 Grat. 708; Reid's Adm'r v. Blackstone & als, 14 Grat. 365-'6; Redford's Adm'r v. Peggy, 6 Rand. 316; Manns v. Givens, 7 Leigh 689; Phoebe v. Boggess, 1 Grat. 129; Ben Mercer & als v. Kelso's Adm'r & als, 4 Grat. 106; 2 Lom. Ex'ors, 337.)

The statutory mode of proceeding was *exclusively* applicable, as above stated, where the person held as a slave prosecuted his suit for freedom, against *him who claimed to be his master*; but if a colored person were deprived of his liberty by one *not claiming him as master*, he might resort to the same remedies as a white man, *e. g.* to the writ of *habeas corpus*. (De Lacy v. Antoine & als, 7 Leigh, 443; Ruddell's Ex'or v. Ben, 10 Leigh, 467; Shue v. Turk, 15 Grat. 256, 260.)

- 7<sup>1</sup>. Doctrine as to the right of a negro recovering his freedom, to *recover damages*.

He can recover no damages, independently of statute, not by *contract*, for none can be implied in such case, nor as of *natural right*, because taking one case with another, the expense of rearing, and of supporting in sickness and age, is not more than compensated by the service, nor would it be possible to take the account on any basis of principle. But *by Statute*, the jury were permitted to allow damages pending the suit. (Alfred v. Fitzjames, 3 Esp. 3; Skyring v. Greenwood, 4 B. & Cr (10 E. C. L.) 281; Pleasants v. Pleasants, 2 Call, 319; Paup's Adm'r v. Mingo, 4 Leigh, 176; Peter v. Hargrave, 5 Grat. 12; V. C. 1860, ch. 106, § 7; Osborne v. Taylor's Adm'r & als, 12 Grat. 117.)

- 8<sup>1</sup>. Doctrine as to the liability of the hirer of a slave; W. C.

- 1<sup>k</sup>. For safe return of slave; W. C.

- 1<sup>l</sup>. Where there *was a contract* for a certain measure of liability.

The liability was of course *regulated by the contract*, but in general, a contract to *return at the end of the year* was construed to mean only to *use due diligence* to that end, so that, if the failure to return was occasioned by *no default* of the hirer, as by



reason of the slave's death, or his absconding, the hirer was excused. (Harris v. Nicholas, 5 Munf. 483.)

2<sup>l</sup>. Where there *was no contract*.

The liability of the hirer of a slave, in the absence of any special contract, was the same as that of the bailee of any other chattel. The bailment being for the *mutual benefit* of both bailor and bailee, the latter was bound to take *ordinary care*, and if he perverted the slave from the purpose for which he was *professedly hired*, he was liable for *all the consequences arising from the perversion*. (Spencer v. Pilcher, 8 Leigh, 566; Harvey v. Epes, 12 Grat. 153; Harvey v. Skipwith, 16 Grat. 393.)

It may be added, also, that the hirer of a slave was not at liberty to employ him as the owner might, *in any way* whatever; and if he put him upon a *dangerous service*, he was answerable for the consequences, although he might appear to have been guilty of no immediate negligence. (Spencer v. Pilcher, 8 Leigh, 566; Harvey v. Epes, 12 Grat. 172 &c.; Randolph v. Hill, 7 Leigh, 383.)

2<sup>k</sup>. Doctrine touching the *Apportionment* of Slave hires.

When the slave was *sick* during the year, or *ran away*, there was no apportionment, but the *whole hire* was payable; but if he *died* during the year, the hire was apportioned according to the time of the death. (George v. Elliott. 2 Hen. & M. 6; 1 Fonbl. Eq. 376-'7, and notes.)

If the owner had only a *life-estate*, which ended during the year, by his death, no hire was payable at common law to his representatives for the time previous to his death, unless the death occurred on the day when the hire was due. For that time the hire was lost wholly, on the maxim that, *in respect of time, annua nec debitum, judex non separat*. This principle, however, is in Virginia abolished by statute, in pursuance of which the hire was in such case *apportioned*. (V. C. 1873, c. 136, § 1.)

3<sup>k</sup>. Doctrine as to Liability for *Medical Bills*, in case of slaves hired.

The *owner*, and not the temporary hirer, was *ultimately* liable, although the doctor might assert *his demand* against the person who employed him. (Easley v. Craddock, 4 Rand. 425; Isbell's Adm'r v. Norvell's Ex'or, 4 Grat. 176.)

9<sup>l</sup>. What persons were slaves in Virginia at the date of the abolition of slavery.

Those who were such on the 1st of July, 1850 ; such free negroes as became slaves pursuant to law ; such slaves as might be lawfully brought into the State ; and the descendants of *female slaves*. (V. C. 1873, c. 103, § 1, 2, 3 to 8.)

10<sup>1</sup>. Propositions, from time to time, for *General Emancipation*.

Mr. Jefferson's plan (1779), Judge St. George Tucker's (1803), and that proposed in the General Assembly in 1831-'2, were all founded on the principle of emancipating only those born after a specified time, especially *females* so born, and of removing the free colored population beyond the limits of the United States. (Jeff. Notes on Va. 143 ; 1 Tuck. Bl. Pt. II, App'x 76 & seq. ; Id. 81, n \* ; 4 Jeff. Mem. 388 & seq.)

The difficulties attending any scheme of general emancipation, were in the highest degree formidable. They may be summed up thus, viz: difficulties connected with the *value of the property* concerned, which was at least *one-third* of the entire property of the Commonwealth ; difficulties arising out of the *aggressive fanaticism* of other sections, which would have been encouraged, by any step in that direction, to increased exertions to disturb the peace, and jeopard the safety of our people ; and especially difficulties connected with the apprehended *disastrous results of emancipation* upon the colored population themselves, and through them upon society at large, the successive censuses, particularly from 1840 to 1860, showing a great *physical and moral deterioration* on the part of the *free-blacks*, whether as compared *with the slaves*, or *with whites*. (Dew on Slavery, 40 & seq.)

The colony of Liberia was founded by the wise forecast of Virginia statesmen chiefly, as the best medium of ameliorating the condition of things growing out of slavery, and with the hope that it would at the same time diffuse the light of Christian civilization through the dark places of Africa.

11<sup>1</sup>. Alarms of servile insurrection in Virginia.

Alarms of servile insurrection were rare, confined always within very narrow local limits, and never endured longer than the time required to assemble the neighboring male population. Only two incidents of the kind are of sufficient importance to have found a place even in local history ; namely *Gabriel's* attempt near Richmond, in 1800, which was wholly futile ; and *Nat Turner's*, in the county

of Southampton, in 1831, which was accompanied by the murder of fifty-five persons, chiefly women and children. These occurrences excited, temporarily, great terror, but in general the intercourse between the races was kindly, and free from suspicion, the rural population dwelling in undisturbed confidence, frequently in the midst of a colored population numerically greatly superior. And during the late war, the conduct of the colored people was in the highest degree praise-worthy, as indeed in the main it has been since. (2 Howis. Va. 391, 439; Dew on Slavery, 99.)

#### 12<sup>1</sup>. The Abolition of Slavery in Virginia.

The Constitution of 1864, framed during the war by delegates from a very small portion of the inhabitants of a very few counties, which by its terms took effect from the date of its adoption, (7th April, 1864,) provided that slavery and involuntary servitude (except for crime,) should be abolished and prohibited in the State for ever. (Art. IV, § 19.) Some months after the conclusion of the war, viz.: on the 19th June, 1865, a General Assembly, representing all the counties of Virginia, convened by the proclamation of the governor chosen in pursuance of that Constitution, assembled at Richmond, and tacitly recognizing the governor as chief magistrate, and that Constitution as the fundamental law, proceeded to legislate under it. On the 18th December, 1865, the Secretary of State of the United States officially announced that Art. XIII of the Amendments to the Constitution, had been ratified by *three-fourths* of the States, thereby making it a part of the Constitution; whereby it was ordained that neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Whether slavery, therefore, was abolished in Virginia, 7th April, 1864, or when Governor Peirpoint assumed, *de facto*, the administration of affairs; or on the 19th June, 1865, when the Legislature assembled, and tacitly recognized the Constitution of 1864; or on the 18th December, 1865, when the XIII Amendment was ratified, may be a matter of some question. It is assumed as incontrovertible, that President Lincoln's proclamation abolishing slavery in the States then in rebellion, on the 1st day of January, 1863, was operative only

in that portion of the country which the armies of the United States had securely occupied, after the proclamation by its terms took effect; and that the abolition of slavery is to be referred either to the action of the State itself, or to the adoption of the XIII Amendment. (McMath v. Johnson, 41 Miss. (Reynolds) Rep. 459-'60; Vicksburg & M. R. R. Co. v. Green, 42 Id. 436; Henderlite v. Thurman, 22 Grat. 466; Rives v. Farish, 24 Grat. 130, 134.)

- 13<sup>1</sup>. Measure of recovery in controversies touching the detention or conversion of slaves, detained or converted, prior to the Abolition of Slavery.

When the possession was *in defendant*, under a *bona fide* claim of right, at the time of the emancipation of the slaves in this Commonwealth, by the Federal or State authorities, the values or damages assessed, should the plaintiff recover, shall be only the value of the services of such slaves from *the time of the tortious conversion or detention, to the period of their emancipation*. (Acts 1866-'7, p. 810, c. 42.)

*Quære* of the validity of this statute; the right of the plaintiff to recover being a *vested right*!

- 14<sup>1</sup>. Doctrine as to the validity and effect of bond given for the purchase-money or hires of slaves, bought or hired previous to the period of emancipation.

It would seem that there could be no reasonable doubt of the validity of such bonds, notwithstanding the subsequent emancipation, and it has been so decided in North Carolina, and in other States. (Harrell, Adm'r, v. Watson, &c., 63 N. C. Rep. (Phillips), 454; Phillips v. Evans, &c., 38 Mo. Rep. (7 Whitteley), 305; Wainwright's Adm'r v. Bridges & als, 19 La. An. Rep. 224; Austin v. Sandel, Id. 309; Bradford v. Jenkins, 41 Miss. Rep. (Reynolds), 328; Blewett v. Evans, 42 Id. 804. See Medrazo v. Willes, 3 B. & Ald. 353; Mittelholzer v. Fullarton, 6 Hd. & Bl. N. S. (51 E. C. L.) 989.)

Thus it is held in Alabama, that an action lies on a promissory note given for slaves, after the date of the President's emancipation proclamation, and the end of the rebellion. (McElwain v. Mudd, 44 Ala. 48.) And it is also held in the same State, that a warranty of title to slaves is not broken by the abolition of slavery. (Fitzpatrick v. Hearne, 44 Ala. 171.) So a bond given for the price of a slave sold in Kentucky in 1833, is recoverable in Illinois, notwithstanding the abolition of slavery there, the contract being valid where and when it was made. (Round-

tree v. Baker, 52 Ill. 241; Officer v. Sims, 2 Hick. 501.)

The question is now set at rest by the judgment of the Supreme Court of the United States in *White v. Hart*, 13 Wal. 646; and *Osborne v. Nicholson & al*, Id. 654. In the first-named case, it was held, in respect to a promissory note for \$1,230, the purchase-money for a slave, made February 9, 1859, and payable March 1, 1860, that a provision in the Constitution of Georgia of 1868, declaring that "no court or officer shall have, nor shall the General Assembly give jurisdiction to try or give judgment, or enforce any debt, the consideration of which was a slave, or the hire thereof," was void, as *impairing the obligation of contracts*, and that this note was recoverable. (See 13 Wal. 653-'4.) *Boyce v. Tabb*, 18 Wal. 548, recognizes and re-affirms the doctrine laid down in *White v. Hart*, and *Osborne v. Nicholson*, *supra*. And in Virginia it is well settled that such bonds and notes are valid. (*Henderlite v. Thurman*, 22 Grat. 466; *Rives v. Farish*, 24 Grat. 128.)

4<sup>b</sup>. Slavery, in its relation to the Federal government.

The words "slave" and "slavery" nowhere occur in the Constitution of the United States (until on the 18th December, 1865, by amendment XIII, the institution was abolished); but the things *represented* by these words are distinctly alluded to in three passages of the original Constitution;

W. C.

1<sup>i</sup>. The clause of the Constitution directing the apportionment amongst the States of representatives and direct taxes.

They were to be apportioned amongst the States according to population; to be determined by adding to the whole number of *free persons* (including those bound to service for a term of years, and excluding Indians not taxed), three-fifths of *all other persons*. (Art. I, § ii, 3.)

This arrangement, by blending the benefit and the burden, happily adjusted one of the most embarrassing of the many hard problems occurring in the erection of our federal structure. (2 Mad. Pap. 731, 1052 to 1056, 1066 to 1087, 1090 to 1094, 1227, 1233; 3 do. 1261, 1544.)

2<sup>i</sup>. The clause of the Constitution denying to Congress the power to prohibit prior to 1808 the *importation of such persons* as any of the States "*now existing*" shall think proper to admit. (Art. I, § ix, 1.)

The first draft of the Constitution denied such power to Congress altogether, even *forbidding a tax* on persons thus imported; but on the 22d August, 1787 (less than a month before the final adjournment of the body), Luther Martin, of Maryland, moved that Congress have power to tax or prohibit the importation of slaves—a proposition very warmly sustained by Messrs. Madison, Mason, and Randolph, of Virginia, and vehemently opposed by the delegates from South Carolina and Georgia, who adroitly suggested that it was *the interest* of New England also to oppose it, as they would be the carriers of the commodities produced by slave labor, besides being profitably concerned in importing the slaves. This brought over the New England States in a body, and they, together with Maryland, North Carolina, South Carolina, and Georgia, succeeded in postponing the power of Congress to inhibit the slave trade, in respect to the *existing States*; until 1808, against the protest of Virginia, Delaware, Pennsylvania, and New Jersey. (3 Mad. Pap. 1388 to 1392, 1427; 2 Rives' Madison, 445 & seq.; 5 Ell. Deb. 457, &c., 471, 477-'8.)

The power committed to Congress was promptly exercised, by statutes making it piracy, and at length a *capital felony*, for any American citizen, or any one whomsoever, being of the crew of an American vessel, to be concerned in the African slave trade. (1 Bright. Dig. 840, 842; Rev. Stats. U. S. p. 1047, § 5375; 1 Rob. Pr. (2d Ed.), 15 & seq.; Synops. Crim. Law, 21-'2.)

- 3<sup>1</sup>. The clause of the Constitution providing for the delivery up of fugitives from *service or labor*.

No person held to service or labor in one State under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. (Art. IV, § iii, 3.)

This provision was not proposed in Convention until 28th August, 1787, and was then adopted *nem. con.* (3 Mad. Pap. 1447, 1556.)

The first act of Congress to give effect to it was that of February, 1793. (1 Bright. Dig. 294.) It failed of efficiency because it committed its administration to *State officials*, who, in some of the States, were finally prohibited by the State laws from acting. Indeed, Virginia had been amongst the first to declare

that it was not competent to Congress to devolve the execution of Federal laws upon State officers. (Feeley's Case, 1 Va. Cas. 321; Jackson v. Rose, 2 Va. Cas. 34; Poole's Case, Id. 276.) Several of the States, however, proceeded to oppose *positive obstructions* to reclamations by masters of their fugitive slaves, which were emphatically condemned as unconstitutional by the Supreme Court of the United States, in Prigg v. Penn'a, 16 Pet. 539. See also Wright v. Deacon, 5 Serg. & R. 63; Com'th v. Griffith, 2 Pick. 19; Jack v. Martin, 12 Wend. 316; S. C. 14 Wend. 507; 1 Rob. Pr. (2d edit.) 32, & seq.

The last and more effective statute was that of September, 1850, whereby the duty of aiding in the recovery of fugitive slaves was devolved exclusively on *Federal functionaries*. (1 Bright. Dig. 295; Prigg v. Penn'a, 16 Pet. 539; Jones v. Van Zandt, 5 How. 229; Moore v. Illinois, 14 How. 18.)

### 3<sup>d</sup>. Slavery in its relations to the world.

The discussion of slavery in its relations to the world will oblige us to advert to—(1), The African slave-trade; (2), The effect of a slave's going to another country where slavery does not exist, supposing him to return; (3), Liability for seizing or harboring a slave, or for his price, where slavery is lawful, the action being brought where slavery is unlawful; (4), Liability of a master to pay wages to a slave who continues to serve him without a contract, in a country where slavery is not lawful; and (5), The effect of a contract to render perpetual service;  
W. C.

#### 1<sup>h</sup>. The African slave-trade; W. C.

##### 1<sup>l</sup>. The origin of the African slave-trade.

The Spaniards and Portuguese, in the course of their African discoveries, were the first to institute it, and they made great profit thereby. The English followed the example. Sir John Hawkins made several voyages, commencing in 1562, for the purpose of seizing negroes in Africa, and selling them in the West Indies; and in 1585 a company for carrying on the traffic was incorporated by letters patent of Queen Elizabeth. Thenceforward great encouragement was given to it by royal charters, treaties, and acts of parliament. It was not until 1806 (Stat. 46 Geo. III.) that Great Britain declared it unlawful (almost *thirty years* after Virginia had set the example), and even to this day the English and American courts have been obliged to allow, atro-



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The slave's *status* as a *freeman* is thereby established, and his subsequent return to a slave domicile does not change it. (Foster's adm'r v. Fosters, 10 Grat. 492.)

- 3<sup>d</sup>. Effect where the slave is carried thither, or goes, by his master's consent, for the purpose of *temporary sojourn*.

As the law of the non-slaveholding country recognizes no authority in the master, it will of course allow none to be enforced, and the slave, by writ of *habeas corpus*, may be released from any restraint on the part of the master. (Somerset's case, 20 How. St. Tri. 1; S. C. Lofft's R. 1, 17; Smith v. Brown & Cooper, 2 Salk. 666.)

But the *common law* does not cancel or annul the relation of slavery. It simply does not acknowledge it. Hence, if the slave be afterwards found within the slave domicile, the master's rights having never been impaired, may be there enforced. This doctrine is acknowledged by *Lord Stowell*, (Slave Grace, 2 Hagg. Adm. R. 94); by the Supreme Court of *Massachusetts*, (Commonwealth v. Aves, 18 Pick. 218); by the Supreme Court of *Kentucky*, (Graham v. Strader, 5 B. Monr. 176; Collins v. America, 9 B. Monr. 585; Mercer v. Gilman, 11 B. Monr. 210; Maria v. Kirby, 12 B. Monr. 542); by the Supreme Court of *Maryland*, (Joice's case, 4 Har. & McH. 295, &c.); by the Supreme Court of *Virginia*, (Lewis v. Fullerton, 1 Rand. 21); and by most of the judges of the *Supreme Court of the United States*, (Dred Scott v. Sandford, 19 How. 452, 459, 466-'7 483, 485-'6, 494, 499, 550, 558, 591); Stor. Conf. Laws, § 96.)

If the law of the non-slaveholding country *expressly dissolves* the relation of master and slave, and *declares the slave to be free*, or where, by *competent proceedings* whilst in the country, the slave is adjudged to be free, a different conclusion might perhaps be admitted. Thus where Louisiana slaves were carried to *France*, (whose law expressly declares all slaves on French soil to be free), and afterwards returned to Louisiana, they were adjudged *to be free there*. (Maria Louise v. Maret, 9 Louisiana R. 473; Smith v. Smith, 13 Louis. 441; Thomas v. Genevieve, 16 Louis. 483. See also Betty, &c., v. Horton, 5 Leigh, 623.)

- 2<sup>d</sup>. Effect where the slave escapes into the non-slaveholding country, *without the master's consent*.

Slavery being the result of positive local law, it can exist only where it is by law established; and if a slave escapes or is carried beyond the slave territory, if his master can reclaim him, it is only by virtue of some express stipulation, or as a matter of international comity. (Grot. *de Jure*, &c., L. II, c. XV. 5, 1; Id. LX. c. X, 2, 1; The *Antelope*, 10 Wheat. 120; Commonwealth v. Aves, 18 Pick. 218; Forbes v. Cochrane, 2 B. & Cr. (9 E. C. L.) 440; Prigg v. Pennsylvania, 16 Pet. 594.)

- 3<sup>b</sup>. Liability for seizing or harboring a slave, or for his price where slavery is lawful, the action being brought where slavery is *unlawful*.

The action is maintainable for the injury, or the price, if the injury, or the sale took place in a country where slavery is allowed by law (Smith v. Brown, &c., 2 Salk. 666; Madrazo v. Willes, 3 B. & Ald. 353.) But see Forbes v. Cochrane, 2 B. & Cr. (9 E. C. L.) 448; Mittelholzer v. Fullerton, 6 Ad. & El. (N. S.) (51 E. C. L.) 989; *ante* p. 174.)

- 4<sup>b</sup>. Liability of a master to pay wages to a slave, who continues to serve him, *without a contract*, in a country where slavery is not lawful.

No wages are recoverable, there being no *actual* contract, and no ground on which to *imply* one. (Alfred v. Fitz James, 3 Esp. 3; *ante* p. 169, 7<sup>1</sup>.)

- 5<sup>b</sup>. Effect of contract to render *perpetual service*.

The law does not prohibit such a contract, which creates a *status* very distinguishable from slavery. It is, indeed, in principle, no more than making *for life* such a contract as every apprentice makes *for a term of years*. But such a contract, for its improvidence, cannot but suggest a suspicion of fraud, or oppression, which it would be requisite to remove by showing it to be fair. It is said it must be *by deed*, although it is not perceived why; and at all events no adequate remedy exists practically to enforce such an engagement. There is no means to compel its observance *specifically*, (as there is in case of an *apprentice*, and formerly was in case of an *indentured servant*,) and the damages given by a jury for its breach would probably be merely nominal. (1 Bl. Com. 424-'5; Wallis v. Day, 2 Mees. & W. 281; 15 Vin. Abr. Master, &c., (N), 5.)

- 4<sup>s</sup>. Who shall be deemed a *negro or colored person* in Virginia.

Every person having *one-fourth or more* of negro-

blood, shall be deemed a colored person. (V. C. 1873, c. 103, § 2.)

2<sup>f</sup>. Menial Servants; W. C.

1<sup>g</sup>. Why they are so called.

Because they are *domestics*, employed *intra mœnia*. (1 Bl. Com. 425.)

2<sup>g</sup>. What servants are *Menials*.

A head-gardener is a menial servant, notwithstanding he is lodged in an out-house, so *a fortiori* is a groom; but not a governess, nor a clerk. (Nowlan v. Ablett, 2 Cr. Mees. & Ros. 54; Todd v. Kerrich, 8 Exch. 151; Berston v. Collyer, 4 Bingh. (13 E. C. L.) 309.)

3<sup>f</sup>. Apprentices.

The doctrine touching apprentices may be presented under the following heads: (1), Who are apprentices; (2), The mode of binding apprentices; (3), The obligation of master, apprentice, and parent or guardian, respectively; (4), The authority of a master over an apprentice; (5), The assignment by a master of the indentures of apprenticeship; (6), The adjustment of controversies between master and apprentice; (7), The punishment for harboring an apprentice, and for his desertion; and, (8), The dissolution of the contract of apprenticeship. W. C.

1<sup>g</sup>. Who are Apprentices.

Servants (so called from *apprendre*, to learn,) who are bound for a term of years to serve their masters, by whom they are to be *maintained and instructed*. Every contract for teaching or learning a trade is *prima facie*, an apprenticeship, and so it is an apprenticeship where the substantial object is *to learn*, and not merely *to serve*. (1 Bl. Com. 426; Rex v. Closeworth, 6 Ad. & El. (33 E. C. L.) 236; Rex v. Combe, 8 B. & Cr. (15 E. C. L.), 82; Rex v. Edingale, 10 B. & Cr. (21 E. C. L.) 739.)

2<sup>g</sup>. The mode of binding Apprentices.

Let us note (1), The instrument of the contract; (2), The proper parties to the contract; and, (3), The terms of the contract of apprenticeship.

W. C

1<sup>h</sup>. The instrument of the contract.

It must always be *in writing*, and according to the better opinion, must at common law be *by deed*, although, if the deed be lost, *its contents*, as in all other cases, may be proved. It is the only *executory* contract which the common law did not permit to be *by parol*, bills of exchange being no exception to this proposition, because they were not *originally* known

to the common law, but were adopted into it, from the custom and usage of merchants. (Castor & Aicles' case, 1 Salk. 68; Bac. Abr. Master, &c., (A), 1; 1 Pars. Con's, 533.)

In Virginia, however, it seems that it may be in writing only, *without seal*. (V. C. 1873, c. 122, § 5, 7.)

2<sup>b</sup>. The proper parties to the contract of Apprenticeship; W. C.

1<sup>i</sup>. Doctrine at common law as to the proper parties.

It seems not inadmissible that an adult should bind himself apprentice, but generally the person bound is *an infant*, and in Virginia, the Statute (V. C. c. 122, § 1, & seq.) contemplates none others as such. Whether the person bound be infant or adult, he himself is, at common law, an indispensable party to the engagement, and his consent is usually signified by his signing the contract (*indenture* as it is called.\*) The father has no right to bind the child without his consent, and indentures executed by the father, without the child's concurrence, are not only voidable, but void. So the party contracting to teach, must be *capable to contract*, and, therefore, a married woman cannot be such party. (Bac. Abr. Master, &c., (A), 1; Id. (B), 1; Rex v. Closeworth, 6 Ad. & El. (33 E. C. L.) 236; Pierce v. Massenburg, 4 Leigh, 493; King v. Armesby, 3 B. & Ald. (5 E. C. L.) 584; Rex v. Guilford, 2 Chit. 284.)

On the other hand, it seems regarded as necessary, (as it is certainly *usual*,) that some friend, father, guardian, &c., should be bound along with the infant for the faithful observance of the indentures by him. (Bac. Abr. Master, &c. (A), 1; Id. (B), 1.)

2<sup>i</sup>. Doctrine by Statute in Virginia, as to proper parties; W. C.

1<sup>k</sup>. Doctrine by Statute in Virginia as to proper parties, *generally*.

The statute contemplates that the person bound shall be a *minor*; that the binding may be by the father or guardian, or if there be neither, by the mother; that it shall be by consent *in writing*, of the minor himself, if of the age of fourteen, and if under that age, by consent entered of record, *of the court* of the county or corporation in which he resides; and that it shall be *in writing*, and filed within six

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\* NOTE.—A *indenture* is a writing *under seal, inter partes*, wherein the parties *mutually stipulate*, in contradistinction to a *deed poll*, in which only *one party* stipulates, or promises. (2 Bl. Com. 295.)

months from the date, in the clerk's office of the court of the county or corporation where it was executed. (V. C. 1873, ch. 122, § 1, 5, 7.)

The statute further provides that, by the same authority, and under like limitations, a *minor* may be placed in any *incorporated asylum* for destitute children, which will then be entitled to the minor's custody, or to bind him apprentice. (V. C. 1873, ch. 122, § 2.)

2<sup>k</sup>. Doctrine by Statute in Virginia, as to proper parties in the *binding of poor children*.

Any minor "*found begging in a county or corporation, or likely to become chargeable thereto,*" may by *any overseer* of the poor, by an *order of court first had*, be placed in such incorporated institution as above-named, or be bound apprentice, if a boy, until twenty-one, and if a girl, until eighteen, (filing the indentures as above-stated, *supra* 1<sup>k</sup>). In no case need the minor himself be a party to the binding (it being *matter of police*), but the covenants ought to be *with him* as well as with the overseer, and such is the usual and proper form of the indentures (Hen. Just. 68). But even if the covenants were *with the overseer only*, if the binding were in pursuance of the statute, the suit on the indentures should be *by the apprentice*, and not by the overseer, (Wilton v. Poindexter, 3 Munf. 183; Brewer v. Harris, 5 Grat. 285, 292, 203;) but if the binding were not in accordance with the statute, the suit *at common law*, must be in the name of the overseer, for the benefit of the minor, (Bullock v. Sebrell, 6 Leigh, 560), although *by statute* with us, (V. C. 1873, ch. 112, § 2), it may be in the *minor's own name*. (V. C. 1873, ch. 122, § 3, 4, 5, 7; Bac. Abr. Master, &c. (B.) 1; Rex v. St. Nicholas, 2 T. R. 729; Carr v. Jones, 3 Serg. & R. 158.)

3<sup>h</sup>. The terms of the contract of Apprenticeship; W. C.

1<sup>i</sup>. Terms of the contract *at common law*; W. C.

1<sup>k</sup>. Terms on the *part of the Apprentice*.

Faithfully to serve the master in all such lawful business as he shall be put to by him, and to behave himself honestly and obediently towards the master, and honestly and orderly towards his family. (Hen. Just. 69; Grayd. Forms, 304,)

2<sup>k</sup>. Terms on the *Master's part*.

That he covenants *with the apprentice*, to instruct him in the art, trade or mystery agreed on; to allow him sufficient meat, drink, apparel, &c., during

the term of apprenticeship; and to do whatever else is agreed on. (Hen. Just. 69; Grayd. Forms, 304.)

2<sup>d</sup>. Terms of the contract of apprenticeship in Virginia, *by statute*; W. C.

1<sup>k</sup>. Terms where the Apprentice is Bound by the *Parent or Guardian*, without an order of court.

The age of the minor shall be specified, and what art, trade, or business he is to be taught; and the master shall be bound to teach the same, whether expressly provided in the writing or not, and also to teach him reading, writing and common arithmetic, including the rule of three. (V. C. 1873, c. 122, § 5.)

2<sup>k</sup>. Terms where the child is bound by *order of court*.

The same as in the preceding case (1<sup>k</sup>), *and also* a stipulation by the master to pay what the court shall direct (if anything), for the *apprentice's services*, to the father or mother, or part to each, annually, or to the apprentice at the end of the term, with interest; but the last year's payment shall go to the apprentice always. The payment of these sums is to be secured by bond, if the court shall so order, recoverable in a summary way. (V. C. 1873, c. 122, § 6, 7, 9 to 11.)

In both these cases (2<sup>k</sup> & 1<sup>k</sup>), the terms of the contract, *at common law*, must be observed.

3<sup>d</sup>. Obligation of Master, of Apprentice, and of Parent, &c., respectively, together with the Rights of the Master; W. C.

1<sup>h</sup>. Obligation of *Master*; W. C.

1<sup>i</sup>. Maintenance.

The master being entitled to all the apprentice's earnings, is bound, independently of express stipulations, to supply him with *necessaries*, including medicines, medical attendance, and nursing; and whilst the master's death, during the term, terminates the obligation *to teach* (which is merely *personal*), the obligation of maintenance, &c., continues unimpaired. (Easley v. Craddock, 4 Rand. 425; Reg. v. Smith, 8 Car. & P. (34 E. C. L.) 153; Bac. Abr. Master, &c. (G).)

2<sup>i</sup>. Instruction in the Trade, &c.

The trade, or business, may be any whatsoever, *e. g.*, that of a chimney-sweep, a housewife, a sailor, a farmer, a mechanic, an attorney, and even, it is said, a *clergyman*; and whatever the trade or business is, the master is bound to give instruction in it, and is not discharged by the apprentice's feeble health, or

his inaptitude to learn, or his inability to render service, without his default. (Bac. Abr. Master, &c., (A), 2; Id. (C); 1 Pars. Con. 533.)

### 3<sup>1</sup>. Education.

It does not appear that the common law obliged a master to educate an apprentice, any more than a parent a child; but by statute in Virginia, it is made his duty, as stated above, to teach him reading, writing, and arithmetic, whether it is so provided in the writing of apprenticeship or not. (V. C. 1873, c. 122, § 5.)

### 2<sup>b</sup>. Obligation of *Apprentice*.

To serve faithfully during the term, and to behave respectfully and orderly to the master's family, and generally to fulfil his engagements, as set forth in the indentures, (*ante* p. 183, 1<sup>k</sup>.)

It seems that, at common law, no action lies against *an infant*, on the covenants contained in the indentures, or at least that his infancy is pleadable as a defence thereto. (Gylbert v. Fletcher, 4 Cro. (Car.) 179; Lilly's case, 7 Mod. 15; Bac. Abr. Master, &c. (B); 1 Pars. Con. 533; 1 Th. Co. Lit. 177, n (40); 1 Chit. Pl. 132.)

But the contrary doctrine seems well-nigh irresistibly conveyed by 1 Th. Co. Lit. 175; Keane v. Boycott, 2 H. Bl. 512; Rex v. Mountsorrel, 3 M. & S. 497; Rex v. Bow, 4 M. & S. 383; Rex v. Wigston, 3 B. & Cr. (10 E. C. L.) 484; King v. Arundel, 5 M. & S. 259; Bac. Abr. Infancy, &c. (I); 1 Tuck. Com. 78, B. I.

Perhaps it is meant that the action is maintainable *upon the contract* of apprenticeship, such as the *law might raise* from the facts, but not *upon the indentures*; or possibly, that although *no action* can be made good against the infant, he may, notwithstanding, be *chastised by the master*, and be constrained under the statute touching the subject (V. C. 1873, c. 122, § 12), to serve in pursuance of the agreement. (1 Burn's Just. 144.)

To the writer it would appear most consonant to the analogies of the law relating to infants' contracts, to hold that the infancy is no valid plea at common law to an action upon the indentures. And in Virginia it is expressly declared by statute, that an apprentice, notwithstanding his infancy, shall be *liable to the master* for deserting his service. (V. C. 1873, c. 122, § 15.) But independently of this statutory provision, the doctrine best sustained by authority is supposed to be that no



action lies against the infant apprentice upon the covenants contained in the indenture of apprenticeship.

The parent or next friend who undertakes for the infant apprentice is liable to the master, in pursuance of his contract, for the infant's violation of any of the stipulations; but no farther than his covenants extend. (Branch v. Errington, 2 Dougl. 518; Cuming v. Hill, 3 B. & Ald. (5. E. C. L.) 59; 1 Pars. Con. 534-'5.)

4<sup>b</sup>. The rights of a Master, in respect to the Apprentice.

The master has a right to the *custody* of the apprentice's person, and to *all his earnings* of every description, and to the value of his services, whether rendered with the master's consent or against it, and whether there was or was not an express contract with the apprentice or the master. (Barber v. Dennis, 1 Salk. 68; Eades v. Vandeput, 4 Dougl. (26 E. C. L.) 1; Foster v. Stewart, 3 M. & S. 191, 200; 1 Bl. Com. 429, n (20).)

4<sup>s</sup>. The authority of the Master over an Apprentice; W. C.

1<sup>b</sup>. The general authority of Master.

He may lawfully correct his apprentice for negligence, disobedience, or other improper conduct, so it be done in moderation, but he cannot delegate his authority herein to another. (Bac. Abr. Master, &c. (B), 2; Id. (N); Combe's Case, 9 Co. 76 a, & n (D); 1 Tuck. Com. 77, B. I.)

He may also, at common law, order him, *within the commonwealth*, whithersoever he will, and may even send him out of the commonwealth, if it be so agreed by the contract of apprenticeship, or if the nature of the service for which he is bound imports it, as in case of a sailor's apprentice. (Coventry v. Woodhall, Hob. 134 a; 1 Burn's Just. 219; 1 Tuck. Com. 78, B. I.)

2<sup>b</sup>. The authority of Master to remove Apprentice out of the Commonwealth; W. C.

1<sup>i</sup>. The doctrine at common law.

He cannot do it except as just stated, *supra* 1<sup>b</sup>; and if, notwithstanding he do remove him, it *determines the relation*, and liberates the apprentice. (Coventry v. Woodhall, Hob. 134 a; Commonwealth v. Edwards, 6 Binn. 202; Randall v. Rotch, 12 Pick. 107; Bac. Abr. Master, &c. (E); 1 Tuck. Com. 78, B. I.)

2<sup>i</sup>. The doctrine *by statute* in Virginia.

No apprentice shall *reside* out of the *county or corporation* wherein the writing of apprenticeship is required to be filed, without leave of the court thereof;



and if leave be given, a copy of the writing is to be filed in the new county or corporation whose court has thenceforward cognizance of the apprenticeship. And if, without such leave, an infant apprentice be removed to another county or corporation, and remain *more than one month*, his apprenticeship is at an end. (V. C. 1873, c. 122, § 13.)

**5<sup>s</sup>. Assignment by Master of indentures of apprenticeship; W. C.**

**1<sup>h</sup>. Doctrine at common law.**

Apprenticeship implies a high *personal trust and confidence*, and it is not a matter of indifference to whom it is committed. Hence, *at common law*, the master *cannot legally assign the indentures*, nor do they pass even to his executors, &c. His assignment, if he makes one, passes no interest in the apprentice, but is viewed only as a contract between the assignor and assignee, that the latter shall receive the profits arising from the apprentice's services, just as the assignment of a bond is regarded as a promise that the assignee shall receive the amount. (Baxter v. Benfield, 2 Str. 1266; Rex v. East Bridgford, 2 Str. 115; Caistor & Eccles, 1 Ld. Raym. 683; King v. Storkland, 1 Dougl. 71; 1 Burn's Just. 147; 2 Kent's Com. 265; Bac. Abr. Master, &c. (G).)

**2<sup>h</sup>. Doctrine, by Statute, in Virginia.**

The writing of apprenticeship, with the *approval of the court* of the county or the corporation where the same is required to be filed, and on such terms as it may prescribe, *may be transferred* by the master, or within three months after his death, by his *personal representative*, the assignee succeeding to the master's rights and obligations for the future. (V. C. 1873, c. 122, § 8.)

**6<sup>s</sup>. Adjustment of controversies between Master and Apprentice; W. C.**

**1<sup>h</sup>. Summary adjustment; W. C.**

**1<sup>i</sup>. Tribunal charged with the power of adjustment.**

The court of the county or corporation where the writing of apprenticeship is required to be filed. (V. C. 1873, c. 122, § 12.)

**2<sup>i</sup>. Mode of proceeding in the County or Corporation Court.**

The complaint may be on the part of the *master*, for the apprentice's desertion or other misconduct; and on the part of the *apprentice*, for undeserved or excessive correction, want of instruction, insufficient allowance of food, raiment, or lodging, or non-pay-

ment of what was directed to be paid. And after notice to the party complained of, the court may determine the same in a summary way, making such order as the case may require. (V. C. 1873, c. 122, § 12; Bac. Abr. Master, &c. (C); 1 Tuck. Com. B. I.)

2<sup>a</sup>. Adjustment by action, or suit.

Either party may sue on the contract of apprenticeship. In general, the suit in behalf of the apprentice ought to be *in his own name*, and therefore the covenants ought to be *with him*. But in Virginia he may maintain the action if the covenants are *for his benefit*, although they are *not with him*. (*Ante*, p. 182, 2<sup>a</sup>; 1 Tuck. Com. 78, B. I.)

7<sup>a</sup>. Punishment for harboring Apprentice, and also for his desertion; W. C.

1<sup>a</sup>. Punishment of Apprentice for desertion.

He is liable to his master, *notwithstanding his infancy*, for all damages sustained by such desertion. (V. C. 1873, c. 122, § 15.)

2<sup>a</sup>. Punishment for enticing away, concealing, or harboring an Apprentice.

To *entice*, or, without the consent of the master, to *take or carry away* an apprentice *knowingly* (of which the possession of him, or permitting him to remain on one's premises, *knowing him to be an apprentice*, is conclusive evidence), subjects the offender to a fine of twenty dollars; and *knowingly to employ, conceal, or harbor* any such apprentice, is punishable by a fine of three dollars per day to the master, in addition to the damage sustained by him, whilst the court or justice rendering judgment for such offence may require of the offender a recognizance to keep the peace, and *be of good behavior*. (V. C. 1873, c. 122, § 16.)

8<sup>a</sup>. Dissolution of the contract of Apprenticeship; W. C.

1<sup>a</sup>. Dissolution by consent of *all the parties* concerned.

This, in case of parish-apprentices, includes the overseers of the poor, and in other cases the parent (or guardian), master, and infant himself; and if the binding were *by deed*, the dissolution must be *by deed also*. (1 Burn's Just. 148; Bac. Abr. Master, &c. (G. 2); Castor, &c., Case, 1 Salk. 68; Rex v. Bow, 4 M. & S. 386.)

2<sup>a</sup>. Dissolution *by Master*, in consequence of Apprentice's *gross misconduct*.

As if he deserts the master's service, and *stays long away*, or contracts new and incompatible engagements, but not if he withdraws only *for a short time*, declaring that he never intends to return, but *does return*, and

ask to be received. The contract is more than a *contract of service*, and the master owes it to the young person entrusted to him to bear long with him, as a parent would; and the master's relations and duties cannot be discontinued in consequence of any *ordinary misbehavior*, whilst the apprentice continues with him. (Winstone v. Linn, 1 B. & Cr. (8 E. C. L.) 460; Wise v. Wilson, 1 Car. & Kir. (47 E. C. L.) 662.)

3<sup>b</sup>. Dissolution *by Apprentice*, in consequence of the *Master's default*.

*e. g.*, For cruel and inhuman treatment. (Bac. Abr. Master, &c. (C); McGrath v. Herndon, 2 Monr. (Ky.) 82; Same v. Same, 4 Monr. 481.)

4<sup>b</sup>. Discharge *by Court of County or Corporation*.

For such cause or complaint on either side as satisfies the court that the relation can no longer redound to the good of either; *e. g.*, for habitual drunkenness, habitual neglect, lewd association, &c., working on Sundays, natural idiocy, insanity, &c., but not because the apprentice is lame, or incurably sick, or because he marries without the master's privity. (Bac. Abr. Master, &c. (C); Hawkesworth v. Hillary, 1 Saund. 313, 314, & notes; V. C. 1873, c. 122, § 12.)

When the court orders a discharge, it may order also a restitution of a due proportion of the premium, even though the discharge be granted for the misconduct of the apprentice. (Hawkesworth v. Hillary, 1 Saund. 313, n (3); Bac. Abr. Master, &c. (C).)

4<sup>c</sup>. Laborers.

These are persons who are only hired by the day, week, or month, &c., and do not live *intra mœnia*, like domestics. (1 Bl. Com. 427.)

No public authority in Virginia adjusts the wages to be paid to laborers; but by statute all persons who, not having wherewith to maintain themselves and their families, live idly, and refuse to work for the *usual and common wages* paid to other laborers in the like work, are deemed *vagrants*, and are treated accordingly. (*Ante* p. 127 2<sup>m</sup>; V. C. 1873, c. 51, § 19.)

5<sup>c</sup>. Stewards, Factors, Bailiffs, Agents, &c.

These are species of servants, although in a superior, ministerial capacity. (1 Bl. Com. 427; 2 Kent's Com. 622; 1 Pars. Cons. 78 & seq.)

3°. The manner in which the relation of service affects Master and Servant respectively.

In order to set forth the manner in which the relation of service affects master and servant respectively, it will be necessary to advert to (1), The fact that the relation

of master and servant depends *on contract*, express or implied; (2), The peculiar privileges of an apprentice in England; (3), The doctrine touching the homicide of masters by servants; (4), The obligation of the master touching testimonials to the servant's character; (5), The doctrine touching the liability of the servant to his master; (6), The doctrine touching the servant's dealing for his own benefit with the subject of the agency;

W. C.

1<sup>st</sup>. The relation of Master and Servant depends *on contract*.

The contract may be *express or implied*, and in general, is governed by the same rules as other contracts. Hence, if it is not to be performed within a year, it must by the statute of *parol agreements* (V. C. 1873, c. 140, § 1), be in writing, and signed by the party to be charged. So the engagement must be *mutual*, on the one part to serve, and on the other to employ or pay, although these engagements are not necessarily measured in duration, the one by the other. The servant may be bound to serve for a longer time than the master is bound to employ, and *vice versa*. So service *voluntarily* accepted implies in general a promise to pay for it, unless such promise can be repelled by showing some *sufficient reason* for the service, other than the expectation of wages, *e. g.*, when the service is rendered to a *near relation*, to whom it is due as a debt of affection, or in *anticipation of a legacy*, or in case of one claimed *colorably* as a slave. (1 Pars. Cont. 529 to 531; Williams v. Stonestreet, 3 Rand. 559; Alfred v. Fitz James, 3 Esp. 3; *ante* p. 169, 7<sup>1</sup>.)

The relation of master and servant, depending, as it does, on contract, will oblige us to observe, (1), The mode of entering into a contract of service; (2), The effect of a contract of hiring for an *indefinite time*; (3), The effect of an *entire* contract of service; (4), The effect upon wages of the sickness of the servant; (5), The dissolution of a contract of service; (6), The effect on a contract of service of the marriage of a female servant; (7), The authority of a master over his servant; and (8), The obligation of the master in respect to the servant;

W. C.

1<sup>st</sup>. Mode of entering into the Contract of Service.

At common law, the contract might, in all cases, have been *by parol*, except in case of an apprentice, but by statute of parol agreements in Virginia (V. C. 1873, c. 140, § 1), it is required to be in writing, when not to be performed within a year.

2<sup>nd</sup>. Effect of contract of hiring for an *indefinite time*;

W. C.

1<sup>h</sup>. General Doctrine.

A *general hiring*, that is, a hiring without fixing the duration of the service, is *presumed* to be a hiring for a year, one revolution of the seasons, the presumption being, of course, liable to be changed by proof. (1 Bl. Com. 425; 1 Pars. Cont. 518, n (h); Huttman v. Boulnois, 2 Carr. & P. (12 E. C. L. R.) 510; Turner v. Robinson, 5 B. & Ad. (27 E. C. L. R.) 789; Fawcett, v. Cash, Id. 904.)

2<sup>h</sup>. Qualified Doctrine in case of *menial servants*.

A general hiring of a *menial servant* is also presumed, *prima facie*, to be for a year, but subject to an *implied* condition that the engagement may be determined on either side by a *month's notice*, or by paying or forfeiting a *month's wages*. But the presumption and the implication may both be repelled by contrary proof. (1 Bl. Com. 425, n (5); 1 Pars. Cont. 518, & n (h).)

3<sup>s</sup>. Effect of an *entire contract* for service.

That is, a contract to serve for a *specific time*, or until some *specified result* is accomplished. (1 Bl. Com. 425; n's (5) and †; 1 Pars. Cont. 519 & seq., and n's (i) & (j).)

W. C.

1<sup>h</sup>. The Original Doctrine of the common law.

The original doctrine is that a contract *entire*, in point of *time* or *otherwise*, must be completely performed (unless the performance be prevented by the act or default of the employer, or by act of providence), before any right to compensation accrues, and that notwithstanding the wages be *estimated* by the month, week, &c., supposing them not to be expressly *payable* monthly, &c. And on the other hand, the doctrine is that the employer is bound to pay for the *entire time*, &c., although he may have dismissed the servant before the expiration of the period, unless he dismissed him for *sufficient cause*; and that the employer cannot reduce the recovery upon a contract, by showing a *partial failure* of consideration, or *partial failure* to fulfil the contract, although a *total failure*, in either particular, was always available, if the contract were not *under seal*. (1 Pars. Cont. 520 & seq.; n's (j), (l), and (n); Temple v. Molachlan, 2 Bos. & Pul. (N. R.) 136; Farnsworth v. Garrard, 1 Campb. 38; Withers v. Green, 9 How. 227-'8.)

2<sup>h</sup>. The Modern Doctrine.

The same as that originally prevailing, except only

at particular. The employer, when the not under seal, may reduce the recovery, giving a partial failure of consideration, or of the whole, as well as repel the entire demand by a total failure. (*Barten v. Butler*, 7 East. 320; *Stanton v. Lattimore*, 9 B. & Cr. (17 E. C. L.) 227; *Waters v. Greene*, 9 How. 227 & seq.; *Van Digges*, 11 How. 475; 1 Pars. Cont. 520 to notes.)

Virginia, even where the contract is under seal, if consideration is available in defence, will accept of a plea setting it forth, alleging the damage by sustained, and offering to set them off against the plaintiff's demand. (V. C. 1873, c. 168, b. Pr. 611, 1002.)

This doctrine propounded in *Britton v. Turner*, 6 N. L. 1.)

It is proposed further very judicious innovations upon the original doctrine, which unfortunately does not command a general judicial support. According to that case, a contract *entire in point* of performance, otherwise, must be completely performed before there can be any recovery upon it; nor will there be any implied agreement differing from the express. Hence the employer may decline to accept of a partial or incomplete performance, and the other party *can recover nothing*, however much he may have done. But if the employer *receives benefit* from the work or service, he must give *pro rata* upon an *implied* promise, deducting, from the *pro rata* recovery whatever he has suffered from the failure to perform, in which case he can deduct no more than the *value of* the work or he may forbear to insist on the reduction, and in a separate action may recover *unlimited* damages. (1 Pars. Cont. 524, n (p); Chit. Cont. 1002.)

#### *Sickness of the Servant upon Wages.*

Where there is an agreement to that effect, there is no recovery of the wages for sickness, where the servant is engaged for a term, *e. g.*, for a year, quarter, month, or week. (*Wright v. Elliott*, 2 Hen. & M. 6; *Rutherford v. Elliott*, 1 C. 18, § 25; *Stor. on Cont.* § 962; 1 Pars. Cont. 519, n (i); *Id.* 527, n (x); *R. v. Ludlow*, 1 R. 69; *Chandler v. Grieves*, 2 H. & C. 742.)

#### *Termination of Contract of Service.*

A termination of a contract of service may arise, (1),

By mutual consent; (2), By act of the master; (3), By the act of the servant; and, (4), By the act of God. W. C.

1<sup>h</sup>. Dissolution of Contract by *mutual Consent*.

In which case no new contract arises as of course, *by implication of law*, in favor of the servant, enabling him to recover wages *pro rata*, without a new agreement to that effect, but such agreement may be inferred from all the circumstances, if they seem to warrant it. (Thomas v. Williams, 1 Ad. & El. (28 E. C. L.) 685; Lamburn v. Cruden, 2 Mann. & Gr. (40 E. C. L.) 258.)

2<sup>h</sup>. Dissolution of Contract by *act of the Master*; W. C.

1<sup>i</sup>. Where there is *just cause of Dismissal*; W. C.

1<sup>k</sup>. Consequence of Dismissal *for just cause*.

Upon the principle of *entirety of contract*, a servant properly discharged for misconduct is not entitled to wages from the beginning of the current quarter, or period since the last pay-day, to the time of discharge. (Atkin v. Acton, 4 Carr. & P. (19 E. C. L.) 208; Turner v. Robinson, &c., 6 Carr. & P. (25 E. C. L.) 15; Ridgway v. Hungerford, 3 Ad. & El. (30 E. C. L.) 171; Lilly v. Elwin, 11 Q. B. (E. C. L.) 742.)

2<sup>k</sup>. What is a good cause of Dismissal.

*Moral* misconduct (pecuniary or otherwise,) wilful disobedience, habitual neglect, or any conduct injurious to the master's interests, *e. g.* persuading or assisting an apprentice to desert, &c.; and if such cause exists, it justifies the dismissal, although it was not the inducing motive thereto, nor was even known to the master at the time. But temporary absence without leave, occasional sulkiness, &c., do not amount to sufficient cause. (Spain v. Arnott, 2 Stark, (3 E. C. L.) 256; Atkin v. Acton, 4 Carr. & P. (19 E. C. L.) 208; Callo v. Brouneker, 4 Id. 518; Fillieul v. Armstrong, 7 Ad. & El. (34 E. C. L.) 557; Lacy v. Osbaldiston, 8 Carr. & P. (34 E. C. L.) 80; Amor v. Fearon, 9 Ad. & El. (36 E. C. L.) 548; Read v. Dunsmore, 9 Carr. & P. (38 E. C. L.) 588; Ridgway v. Hungerford, 3 Ad. & El. (30 E. C. L.) 171; Mercer v. Whall, 5 Q. B. (35 E. C. L.) 466; 1 Pars. Cont. 526; Id. 521, & n (K.); Chit. Cont. 579 & seq.; Add. Cont. 746-7.)

2<sup>i</sup>. Where there is *not just cause* of Dismissal.

The servant is entitled to *recover full wages* for the whole term, (year quarter, month, &c.), from the





### 6<sup>th</sup>. Effect of Marriage of Female Servant on contract of Service

She must still serve her time out, and her husband cannot lawfully take her away: nor, on the other hand, is the mere fact of the marriage a sufficient ground on which to discharge her. (5 Burn's Just. 605-6; Com. Dig. Justices of Peace (B. 6. 3).)

### 7<sup>th</sup>. Authority of Master over Servant; W. C.

#### 1<sup>st</sup>. Doctrine at common law.

The servant must obey his master's orders, even though they involve a painful sacrifice of feeling (e. g., omitting to visit a very ill parent); and for wilful disobedience he may be discharged. The master, however, is bound to take as much care of his servant as he would of himself, and may not expose him to danger. (1 Pars. Cont. 520-21, 528; Priestly v. Fowler, 3 Mees. & W. 1; Turner v. Mason, 14 Do. 112.)

The master may also chastise his servant (if *under age*), with moderation, for neglect of duty, abusive language, &c.; and it is even said that the common law permitted him to correct *any servant*, of whatever age, so it were done in reason. (1 Bl. Com. 428; 5 Burn's Just. 761; Bac. Abr. Master, &c. (N).)

#### 2<sup>nd</sup>. Doctrine, by Statute, in Virginia.

The master may exercise over any *minor* hired for a period *not less than one month*, the same authority, control and discipline as over an apprentice, unless it be otherwise stipulated in the contract of hire. (V. C. 1873, c. 122, § 4.)

### 8<sup>th</sup>. Obligation of Master in respect of the Servant.

The obligation of the master in respect to the servant leads us to advert to, (1), The master's obligation as to wages; (2), As to maintenance; (3), As to medicines and medical attendance; (4), As to the servant's personal safety; and (5), As to indemnifying the servant;

W. C.

#### 1<sup>st</sup>. The Master's obligation in respect of wages.

The master is under a legal obligation to pay wages according to contract, express or implied, and the retainer is presumed to be *in consideration of wages*, unless the contrary appear. (1 Bl. Com. 428, & n (18); 1 Tuck. Com. 77, B. I; Bac. Abr. Master, &c. (N); 1 Pars. Cont. 530-31, & n's (d) and (e); *Ante*, p. 169, 179, 189.)

All compensation, however, may be forfeited by the servant's gross misconduct. Thus, if an agent or

deliberately retain trust funds in his own appropriate them to his own use, and refuse or fails to render any account to the principal, is liable to forfeit all claim to compensation. (*Segar v. Whitely*, 20 Gratt. 681-'2);

payment of wages is presumed, where it has been usual to pay weekly, &c., and a considerable time has elapsed, and particularly if the servant has left the master's employment. (*Sellen v. Sellen*, 4 Carr. & P. (19 E. C. L.) 80; 1 Pars. Cont. 32; Chit. Cont. 581.)  
 payment of infant's wages will be allowed;

validity of payments, as against the parent of infant-servant.

father certainly, and possibly, if he be dead, the mother, is entitled to the earnings of an infant unless the parent relinquishes the claim, which, however, is easily implied, as where the child has never before been permitted, without objection, to receive his wages himself. Payments to the parent, therefore, will in general be valid. (1 Pars. Cont. 32.)

validity of payments, as against the infant himself. Payments in money to the infant (supposing him to be capable of receiving his wages), are always valid, but not payments in supplies which are not necessities, or in things paid by the master for such supplies, (e. g., a dress for a female servant), may be disaffirmed by the infant. (*Hedgeley & wife v. Holt*, 4 Carr. & P. (19 E. C. L.) 104; 1 Pars. Cont. 528, n (x).) Payments for things lost or damaged by gross negligence.

action for wages, except by agreement. Master must be ready to pay wages. (*Le Loir v. Bristow*, 11 B. & C. 184; Addis. on Cont. 743.)

master's obligation in respect to Maintenance.

Master is bound on the terms of the contract; but *prima facie* the master, it is believed, is bound to supply food and clothing at least in the case of laborers, menials, and domestics, unless it be otherwise agreed.

master's obligation in respect to Medicines and Medical Attendance.

Master is not bound to supply these to a hired servant whether menial or laborer (as he is to an apprentice p. 183, 1'), unless by special agreement, though the illness were caused by an accident

occurring in the master's service. But if the master himself send for the medical man, he is responsible to *him*, and it is said cannot deduct the amount paid from the servant's wages, unless it be so agreed, which, *if it be so*, probably arises from its being deemed an act of charity and good-will, arising naturally out of the relation, and therefore not warranting *the implication of a promise* to repay. (Sellen & wife v. Norman, 4 Carr. & P. (19 E. C. L.), 80; Cooper v. Phillips, Id. 581; Rex v. Smith, 8 Carr. & P. (34 E. C. L.) 153; Newby v. Wittshire, 4 Dougl. (26 E. C. L.) 284; Wennall v. Adney, 3 Bos. & Pul. 247; Chit. Con. 581; 1 Bl. Com. 425, n. †.)

In case of *slave servants*, the doctrine in Virginia was precisely analogous; that is, medical bills were to be paid *ultimately* by the owner, and not by the temporary hirer, although the doctor might exact the amount from the hirer, if *he* employed him. (Easley v. Craddock, 4 Rand. 425; Isbell's adm'r v. Norvell's ex'or, 4 Grat. 176.)

4<sup>h</sup>. Master's obligation in respect to the *personal safety* of the Servant; W. C.

1<sup>l</sup>. In regard to Employment.

The master has no right to expose his servant to danger without the latter's consent, and is bound to provide for the servant's safety in the course of his employment, to the best of his judgment, information, and belief; but he is not responsible for an accident happening in the course of his service, unless he knew that it exposed the servant to peculiar danger, and the servant did not. (Priestley v. Fowler, 3 Mees. & W. 6; 1 Pars. Cont. 528; Union Pac. R. Co. v. Fort, 17 Wal. 557.)

The hirer of a slave was restricted by a similar limitation. He was not at liberty to engage him in a peculiarly dangerous employment without the master's assent; and if he *perverted* him from the agreed or represented purposes for which he hired him, he was answerable for the consequences which *ensued from such perversion*, although he was guilty of no negligence, nor of any default other than the perversion. (Spencer v. Pilcher, 8 Leigh, 566; Harvey v. Epes, 12 Grat. 153; Harvey v. Skipwith & als, 16 Grat. 393; Bell v. Bowen, 1 Jones, N. C. (Law), 316; Randolph v. Hill, 7 Leigh, 383.)

2<sup>l</sup>. In regard to injuries arising from the *default of Fellow-Servants*.

If the master has selected as his servants persons of

*competent care and skill*, having reference to the employment, he is not answerable to one of them for injuries occasioned by the negligence of a fellow-servant in the *course of their common business*. Hence, the servant of a railroad company injured whilst travelling on the road of his employers, about *their business*, by the carelessness of other employees of the company, cannot recover of the latter; but he might have recovered had he been travelling on his *own business*. (Priestly v. Fowler, 3 M. & W. 1; Hutchinson v. New York, &c., Railway Co., 5 Excheq. 351; Wigmore v. Jay, Id. 357; 1 Am. Lead. Cas. 620; 1 Pars. Cont. 528; Union Pac. R. R. Co. v. Fort, 17 Wal. 557; Packet Co. v. McCue, Id. 508.)

5<sup>b</sup>. Master's obligation in respect to *indemnifying Servant*.

The master is under an implied obligation to indemnify his servant against all pecuniary damages incurred by him, without his fault, in the *course of the employment*, and in consequence of it. (D'Arcy v. Lyle, 5 Binn. 441; 1 Am. Lead. Cas. 691; Smith's Merc. L. 109-'10.)

2<sup>f</sup>. Peculiar privileges of Apprentices in carrying on trade.

These privileges result from many English statutes (which have not been enacted in Virginia), the general object and policy of which are to secure to the country *a class of skilled artizans*. (1 Bl. Com. 427-'8; Bac. Abr. Master, &c. (D).)

3<sup>f</sup>. Doctrine touching homicide of Masters by Servants.

By Stat. 25 Edw. III, c. 2, homicide of masters by servants was declared *petit treason*, and punished with cruel severity. But in Virginia it is treated as *any other homicide*, the distinction as to petit treason being abolished. (4 Bl. Com.. 203; Synops. of Crim. L. 60; V. C. 1873, c. 195, § 4.)

4<sup>f</sup>. Obligation of Master touching *testimonials to servants' character*; W. C.

1<sup>s</sup>. Obligation of Master to *give testimonials to character*.

No obligation exists. (1 Pars. Cont. 529.)

2<sup>s</sup>. Liability of Master on *account of testimonials*; W. C.

1<sup>b</sup>. Liability to *Servant*.

Whether the character be given voluntarily or by request, it is a *privileged communication*; and in order to make the master responsible, it must be, not only *false*, but *malicious*; and the malice is not implied, as in other cases, from the falsity, nor from the occasion of speaking, but it *must be proved*. That the communication is voluntary, is a circumstance to be considered in determining the *bona fides* of it. (Child v.

~~Attk.~~ 9 B. & Cr. 117 E. C. L. 403; Rogers v. Clifford, 3 Bos. & Pul. 357; 1 Pars. Cont. 525.)

**2<sup>a</sup>. Liability to third Person.**

A third person injured by the master's false representation knowingly, of good character in the servant, may recover of the master: for *fraud and damage* together always constitute a cause of action. (Pasley & al. v. Freeman, 3 T. R. 31; Vernon v. Keys, 12 East, 632; Tapp & al. v. Lee, 3 Bos. & Pul. 367; 1 Chit. Pl. 157.)

**3<sup>d</sup>. Doctrine touching Liability of Servant to Master; W. C.**

**1<sup>a</sup>. Liability of Servant, in respect to Duration of Service.**

If the service is *entire*, in point of time, or otherwise, the servant must perform it *completely*, before he can demand his compensation, although if part be paid (not exceeding the proportion of service rendered,) the master cannot recover it back. (1 Bl. Com. 425, n 1; Id. 425, n (15); *ante* p. 190 & seq., 3<sup>s</sup>; 1 Pars. Cont. 522 & seq., & n (1), &c.)

**2<sup>a</sup> Liability of Servant, in respect of his conduct; W. C.**

**1<sup>a</sup>. When the Servant receives a Reward.**

He must observe with diligence and care, the interests of his master, as the master himself would do; must adhere to his reasonable orders, and is liable for not doing so, but is not liable for a loss *by robbery*, without his default. (1 Bl. Com. 425, n (16); Countess of Shrewsbury's case, 5 Co. 14 a; Lord North's case, 2 Dyer, 161 a; Catlin v. Bell, 4 Campb. 153; Shiells v. Blackburne, 1 H. Bl. 161; Bac. Abr. Master, &c., (M), 1; Bernard v. Maury & Co., 20 Grat. 434.)

Hence a factor who sells produce on credit when instructed to sell *for cash*, is liable for any loss which may ensue; and if he use the proceeds of sale as *his own*, as by keeping them amongst his general deposits in bank, he is liable for any resulting loss. (Hairs-ton v. Medley, 1 Grat. 96; Johnson & al v. O'Hara, 5 Leigh, 456.) On the other hand, if he treats the money as belonging to the principal, as by depositing it to the principal's credit in bank, or to his own credit *as agent*, or even to his own individual credit, he having no money of his own on deposit there, and designing it for the principal's benefit, he is not liable for a loss arising from the insolvency of the bank, supposing him to have exercised due care in the selection, and due vigilance; nor from the failure of the currency (*e. g.* Confederate currency) in which the collection was made. Neither is he guilty of any de-

fault in the absence of instructions to the contrary in receiving for his principal that which the law declares to be a legal tender, or which is by common consent considered and treated as money, and *passes as such at par*. In order that he may be justified in receiving a depreciated currency, however, there must be some special circumstances showing that expressly or by implication his authority warranted it. (Ward v. Smith, 7 Wal. 452; Alley & als v. Rogers, 14 Grat. 383-'4; Ewart v. Saunders, 25 Grat. 207; Pidgeon v. Williams, 21 Grat. 251; Davis v. Harman, Id. 194, 203; Hale v. Wall, 22 Grat. 424, 432, 434.) And as long as money or property belonging to a master, or even its product or substitute, can be *traced or distinguished* in the hands of the agent, or his assignees, (unless for value and without notice,) the *master may recover it*. (Norfolk Overseers v. Bank of Va., 2 Grat. 544; Veil & als v. Mitchell's Adm'r, 1 Am. L. C. 650.)

Pre-eminent knowledge and uncommon foresight are not to be required in an agent. Common skill, common prudence and common caution are all that can be demanded. It is unreasonable to judge of his conduct from subsequent events. If he has acted within his power, in good faith, and with fair discretion, he is not to be held responsible for losses which may have accrued from his management. (Myers' Ex'or v. Zetelle, 21 Grat. 733.)

2<sup>h</sup>. When the servant receives *no Reward*.

He is liable only for *gross negligence*, or *fraud*, and for *non-feasance* not at all, for want of consideration. (Shiells v. Blackburne, 1 H. Bl. 162; Coggs v. Bernard, 2 Lord Raym. 913, &c.; Elsee v. Gatward, 5 T. R. 86; Pate v. McClure, 4 Rand. 162, 173.)

3<sup>d</sup>. Liability of Servant in respect of *unlawful appropriation* of Master's goods; W. C.

1<sup>h</sup>. Where they are entrusted to the servant for a *special purpose*.

The appropriation is *larceny*, for his possession is that of the master, *e. g.* in case of plate appropriated by a butler, &c. (Synopsis. Crim. L. 96; 2 Russ. Cr. 197; Walker's case, 8 Leigh, 743; Bac. Abr. Master, &c., (M), 2.)

2<sup>h</sup>. Where the Servant has not merely the *possession* for a *special purpose*, but the *qualified ownership*.

At common law, it was only a breach of trust, or *embezzlement*, (*e. g.*, cloth committed to a tailor, &c.); but by statute in Virginia, embezzlement by *public and bank-officers*, and by *common carriers*, and now by any

person, of property which he has *received* for another, is punished like larceny. (1 Bl. Com. 230 & n (3); Bac. Abr. Master, &c. (M), 2; Synops, Crim. L. 96 & seq.; V. C. 1873, c. 188, § 20, 21; Acts 1873-'4, p. 50, c. 59.)

4<sup>s</sup>. Liability of Servant in respect of *Rendering Accounts*.

It is the duty of a servant to keep a correct account of all money transactions, and to render the same to the principal, with proper frequency, or whenever called on; and such an account has been exacted by a court of equity after the lapse of twenty years, although generally, after a considerable period, a settlement will be presumed. (Pars. Cont. 76-'7; Robertson v. Read's Adm'r, 17 Grat. 544.)

6<sup>t</sup>. Doctrine touching Servant's Dealing *for his own benefit* with the subject of the Agency.

See *post* p. 230, 3<sup>s</sup>; 1 Pars. Cont. 75-'6; 1 Wh. & Tud. L. C. 125, &c.; Segar v. Edwards, 11 Leigh, 213; Buckles v. Lafferty, 2 Rob. 292, 302, Reporter's Note; Bailey's Adm'x v. Robinsons, 1 Grat. 4, 9, 10; Howery v. Helms & als, 20 Grat. 1, 7, &c.

4<sup>o</sup>. The manner in which *strangers* may be affected by the relation of *Master and Servant*.

The master is, or ought to be, concerned by a natural sentiment of sympathy, as well as interest, in wrongs done to his servant, and thereby is engaged to assist him in obtaining redress.

He is also personally interested in such acts of third persons as interfere with the service which the servant has stipulated for.

And lastly, upon the principle *qui facit per alium, facit per se*, he may be answerable for, and interested in, the conduct of his servant. (1 Bl. Com. 429 & seq. and notes; Chit. Cont. 209 & seq.; 1 Pars. Cont. 38 & seq.; Id. 86 & seq.; Bac. Abr. Master, &c. (I), (K), (L), (O), & (P).)

In considering the manner in which strangers may be affected by the relation of master and servant, we are to regard, (1), The doctrine of mutual personal defence, and of maintenance of suits as between master and servant; (2), The doctrine of seducing away or retaining of another's servant; (3), The doctrine touching personal torts done to servants; and (4), The doctrine touching contracts made, and acts done, by a servant in connexion with his employment;

W. C.

1<sup>t</sup>. Doctrine touching the right of mutual personal Defence, and of *Maintenance* of suits, as between Master and Servant; W. C.

1<sup>st</sup>. Doctrine touching the right of mutual *personal defence*.

Each may justify or extenuate an assault or even homicide, in defence of the person of the other, in like manner as in defence of *his own person*. (1 Bl. Com. 429; Bac. Abr. Master, &c. (P); Synops. Crim. L. 40, 43, 141.)

2<sup>nd</sup>. Doctrine touching mutual *maintenance* of one another's suits.

The master may assist the servant *in a suit* against a stranger; whereas, in general, such an act (*e. g.*, helping to bear the expense, or even giving public countenance to the litigants), is an offence against public justice. (1 Bl. Com. 429; Synops. Crim. L. 141; Bac. Abr. Master, (P). And the servant, on his part, may afford his master every other assistance in his suits, *except advancing money*. (Bac. Abr. Master, &c. (P).)

3<sup>d</sup>. Doctrine touching the *seducing away or retaining* of the servants of others; W. C.

The servant who yields to such seduction, or retainer, is always liable to an action, and the new master also, if he knew of the servant's previous engagement. (1 Bl. Com. 429, & n (20); Bac. Abr. Master, &c. (O); 1 Pars. Cont. 532.)

3<sup>d</sup>. Doctrine touching *personal torts* done to Servants; W. C.

1<sup>st</sup>. Where the inquiry does *not* affect the servant's capacity to render the stipulated service.

In general, no action lies at the suit of the master who cannot make the indispensable averment (at common law), of *loss of service*; but the servant may *always sue*, whether the master can or not. (1 Bl. Com. 429; Bac. Abr. Master, &c. (O).)

2<sup>nd</sup>. Where the injury *does* affect the capacity of the Servant to render Service.

The master may, in general, recover damages sufficient to compensate the loss of service.

In case of the seduction of a *female servant*, the master recovers damages *per quod servitium amisit*, but the injury really suffered in that way may not be the measure of recovery. Thus a *parent* can only maintain an action for the *seduction of his daughter*, by virtue of her occupying to him the *relation of servant*, and at common law not only must that relation be proved to exist, but *actual loss of service* must also be shown, although the slightest suffices. In Virginia it is still requisite to prove the *relation* of master and servant, but proof of *loss of service* is dispensed with. Always, however, the *gist* of the action has been, and is, the *grievous wrong*



done to the feelings of the parent, and the good name of the family. (3 Bl. Com. 140, n (27); Bac. Abr. Master, &c. (O); Campbell v. White, 13 Grat. 573; V. C. 1873, c. 145, § 1; Lee v. Hodges, 13 Grat. 726.)

In other cases than that of seduction of a female servant, where the injury to the servant results from force or negligence, the measure of the master's *damage*, and consequently of his recovery, is the *loss of service*. (1 Bl. Com. 429, n (20); 3 Do. 142; Bac. Abr. Master & S. (10).)

Where the injury done amounts to a *felony*, the civil wrong to the master is said to be, at common law, *merged in the felony*; or rather the master is stayed in seeking civil redress, it is said, until the wrong-doer has been either acquitted or convicted of felony. If this is indeed the common law doctrine, which has been gravely doubted (Cook v. Darby, 4 Munf. 447; Allison v. Bank, 6 Rand. 223), it arose from two considerations—1st, lest public justice should suffer, by permitting the injured party to obtain private redress before he has prosecuted, as is his duty, the public crime; and 2d, because, if guilty of felony, the offender, upon conviction, forfeited all his goods to the Crown, and also his lands for his life and a year and a day, and so had nothing wherewith to satisfy a private action. (4 Bl. Com. 6; Bac. Abr. Master & S. (O).) But in Virginia it is provided by statute that the commission of a felony shall not stay or merge the civil remedy of one injured by the felonious act. (V. C. 1873, c. 195, § 6.)

4<sup>f</sup>. Doctrine touching contracts made and acts done by a Servant in connection with his employment.

Let us take notice of, (1), The doctrine touching *contracts* made by a servant in behalf of his master; (2), The doctrine touching *torts* committed by a servant in connexion with his employment; and (3), The doctrine touching the servant or agent dealing for his own benefit with the subject matter of the agency;

W. C.

1<sup>a</sup>. Doctrine touching *contracts* made by Servant in behalf of his master; W. C.

1<sup>b</sup>. Liability and Rights of Master and Servant, respectively.

We will observe, (1), The liability of the *master* on the contracts made by the *servant*; and (2), The liability of the *servant* on contracts made by him on behalf of the *master*;

W. C.

The doctrines relating to contracts made by agents under these heads: (1), Liability of agent to principal; (2), Liability of servant to master; (3), Liability of master to third parties; (4), Delegation of authority; (5), Agency by estoppel; (6), Agent contracting as principal; (7), Declarations by agents or masters;

**1<sup>st</sup>. Mode of creating and for the Master.**

The law prescribe mode of law conferring a agent. For the most or implied, by word or seal or not under seal is generally equivalent to the maxim, "*et mandato priori equi* 676; 1 Pars. Cont. 42 W. C.

Authority may be servant or agent, as *parol*. Prudence was in writing always, for *parol*, of the agent, and latter as agent; but necessary, not even in oral which are required *e. g.*, contracts for those cases, although writing, and signed by *his agent* (V. C. 1877). Authority of the agent may be in two cases where an agent is indispensable, and then in two cases, namely, an authority to make a *ment*, and to make an estate in land, it being should be commensurate to be done. (2 Th. C. Merchant, &c. (B); 1870; Elliott & al. v. Hibblewhite v. McM

liams v. Welsby, 4 Esp. 220; Batty v. Carswell, 1 Am. L. C. 544, &c.; U. S. v. Nelson, 2 Brock, 64; Harrison v. Tiernan, 4 Rand. 180; Downer & Co. v. Morrison, 2 Grat. 237; Rhea v. Gibson's Ex'or, 10 Grat. 220; Preston v. Hull, 23 Grat. 604, & seq.)

2<sup>1</sup>. Implied Authority.

The authority under which the servant acts may be as well implied as express; and the implication may arise from several sources; as (1), From *recognition by the master of similar antecedent acts* of the servant; (2), From the act of the master *in connection with the regular business of the servant or agent*; (3), From the act done being an *essential incident to the power conferred*; and (4), From the *subsequent acquiescence and ratification of the master*.

W. C.

1<sup>m</sup>. Authority implied from the *recognition by the Master of similar antecedent acts of the Servant*.

Thus, authority to purchase goods, or otherwise to contract debts, is implied to a servant, child, or wife, by the acknowledgment and discharge of similar demands previously arising out of their dealings; and authority to draw or accept bills of exchange by the admission of previous bills or acceptances made by the same party in the name of the principal. And so an authority is implied to an agent of a corporation to execute the duties of secretary or other officer of the company, from his acting publicly as such, and being so recognized by the association. (Bac. Abr. Master & S. (K); 1 Pars. Cont. 83 & notes; Chit. Cont. 217 & seq.; Hooe & als v. Oxley, 1 Wash. 19; Burr's ex'or v. McDonald, 3 Grat. 235; Sangston v. Gordon, 22 Grat. 755; Batty v. Carswell, 1 Am. L. C. 550, &c.)

2<sup>m</sup>. Authority implied from the act of the Master or Principal *in connection with the regular business of the Servant or Agent*.

Thus, where one sends goods to an auctioneer's sale depository, an authority to sell them may be implied so far as concerns a *bona fide* purchaser for value; and so a broker *in possession* has an implied power to sell. (1 Pars. Cont. 42; Chit. Cont. 211.)

3<sup>m</sup>. Authority implied as an *essential incident* to some other power.



& al, 15 East, 38; Fenn & als v. Harrison & als, 3 T. R. 761; Yerby v. Grigsby, 9 Leigh, 387; Richmond, F. & P. Rl. Rd. Co. v. Snead & al, 19 Grat. 354; Scherchardt v. Allens, 1 Wal. 369; Hodge's Ex'or v. First Nat. Bk., 22 Grat. 61.)

4<sup>m</sup>. Authority implied from the *subsequent acquiescence and ratification* of the Master.

Such acquiescence and ratification may be proved by express and direct testimony, but also tacitly, by the master's *voluntary acceptance of the benefit* resulting from the servant's action, or by omitting to repudiate it as soon as it is made known to him. (1 Pars. Cont. 44 & seq.; Chit. Cont. 212; Downer & Co. v. Morrison, 2 Grat. 237; Bronson's Ex'or v. Chappell, 12 Wal. 681.)

2<sup>r</sup>. Extent of Servant's Authority.

The extent of the servant's authority depends on the terms of it. It may embrace all of the master's business of *every kind*, (a power seldom conferred,) or all, or more or less of a particular class of affairs, or it may be limited to a single transaction. But whether the authority be general or limited, the servant cannot charge the master *if he exceeds it*. He is of course more likely to transcend the bounds of a narrow than of an extended power; but the *principle* in either case is the same. Within his commission, he binds his master, beyond it, he does not. Whilst, then, we must distinguish clearly between a *general agent* and a *special agent*, it is not because there is a diversity in the leading *principle* which determines the master's liability, but merely in order to adjust the actual measure of it. (1 Bl. Com. 429 & seq.; Bac. Abr. Mast. & S't. (K); Chit. Cont. 215; Hopkins v. Blane, 1 Call. 361; Blane v. Proudfit, 3 Call. 207; Hodge v. Combs, 1 Black, 194.)

Where the servant's act exceeds his authority *in degree only*, and not *in kind*, the master may be bound if the servant will personally take upon himself the excess, or if the other will relinquish it; as for example in case of an authority to buy land at \$50, and a purchase by the servant or agent at \$51; an authority to insure at 3 per cent, and an insurance effected by the servant at 3½; authority to lease for twenty-one years, and the servant leases for twenty-six. So where the servant *stops short* of his authority, the master will be bound or

not according as the servant tain or to frustrate the *purpose* transaction. Thus where the insure to the amount of \$10, is effected by the agent for farm of 150 acres, and one *purpose and inducement* of thwarted by the more circuitous agent, and the former is because the agent were empowered to buy the farm, and he should buy the only; or if he were authorized to buy fee-simple, and were to procure it in *years*, the apparent object of the transaction is frustrated, and he would not be *a fortiori*, if the agent does that he was authorized to do, it may be more advantageous to the principal. Thus where the agent buys A's house, and he buys B's instead, if, upon being empowered to buy the agent's *ship*, he insures not to be lost because he has departed from the instruction, no obligation is incurred. (2 Kent's Com. 61; Alexander, 2 Ves. Sen. 644; Amb. 740; Hervey v. Hervey.)

A *joint authority* must be given. *Several authority* must be exercised where an authority is given to sign mercantile paper with the endorsement of his name by several of the principals. And so a joint authority of A, M., &c. to endorse their names to make a *joint endorsement*, the endorsing of those names by one another, because by the law they are thereby made liable *severally* instead of *jointly*, as was decided in *Beirne*, 1 Grat. 226; *Beirne*, Id. 254, 538; *Stainb* 281.)

And lastly, it may be objected that if the authority is wrongfully perverted to the purposes of the agent, the principal is liable to any one who colludes with the agent in such perversion. And if a person is authorized by the agent without the knowledge of the principal,

the known wishes of the principal, to a purchaser aware of the facts, no title passes, and the principal may recover the property. (Stainback v. Bank of Virginia, 11 Grat. 269, 281; Peshine v. Shepperson, 17 Grat. 472; Morris & al v. Terrel, 2 Rand. 6.) W. C.

1<sup>1</sup>. *General Authority of Servant.*

A general authority confers upon the servant power to transact *all the master's business*, or all of a particular kind, or in a certain locality, and constitutes him what is often called a *general agent*. The power of the general agent being thus defined, it need hardly be stated that no *private instruction* to the agent, circumscribing his power, will avail to shield the master from liability to those who are ignorant of the limitation. Thus, a *horse-dealer* who employs a servant habitually to sell horses for him, is understood thereby to clothe him with the *incidental power* to warrant both the title and quality. And the power to warrant being thus, by implication, a part of the servant's *general authority*, if in any particular instance, he is instructed *privately* not to warrant, the master will notwithstanding, be liable upon any warranty the servant may make to a purchaser, who is not advised of the secret instruction. (Chit. Cont. 216; 1 Pars. Cont. 39 & seq.; Mann v. King, 6 Munf. 428; Batty v. Carswell, 1 Am. L. C. 544.)

2<sup>1</sup>. *Special or Limited Authority of Servant.*

A special or limited authority is one which confers upon the servant authority to do only one or a few *special things* about his master's business, and constitutes the servant a *special agent*. Here, as in the case of the general agent, *private instructions* are of no avail to obviate the master's liability for those acts of the servant which are *within the scope of his authority*. The practical difficulty is that, with special agents, the instructions often *accompany* the authority, being conveyed, it may be, in the same sentence; so that considerable embarrassment sometimes ensues in discriminating between instructions and limitations of the power. Thus, if a person who is *not a horse-dealer*, sends his servant, for a single occasion only, to sell a horse, with private instructions (intended of course *to be kept secret*, and *not communicated*) not to take less than a *minimum* price, the instructions are no part of the servant's commission; and though he dis-

regard them, the sale is notwithstanding obligatory on the master, (1 Pars. Cont. 40 n (d); Hatch v. Taylor, 10 N. H. 538). But where the instructions, though privately given, are given at the same time with the commission, and are of a character which it would not be incongruous to make known (*e. g. not to warrant* a commodity to be sold), they are, or at least will in general be, a *part of the authority*, and the servant's contract in violation of them, does not bind the master. (Chit. Cont. 216, 219; East Ind. Co. v. Hensley, 1 Esp. 112; Jordan v. Norton, 4 M. & W. 155; Horton & als v. Townes, 6 Leigh, 47; Batty v. Carswell, 1 Am. L. C. 544.)

3<sup>k</sup>. Power of a Servant to *delegate his Authority*.

The employment or trust of a servant or agent is for the most part personal, and does or may rest on some ground of individual selection, arising from confidence in the servant's ability or integrity, or both. The general doctrine, therefore, especially in agencies involving the exercise of any discretion, is that the authority cannot be delegated;—*delegatus non potest delegare*. But this supposes that no power, express or implied, has been given to make the delegation, and that there is no subsequent ratification of the act of the substitute. If, therefore, the business be of a character which requires such delegation (in which case the power to make the delegation is implied), and *a fortiori*, if there be an express permission to delegate, or if the master ratify the substitute's acts, or his appointment, he would be as much bound by the acts of the substitute, as by those of the original agent. (1 Pars. Cont. 71-'2; Broom's Max. 665-'6; 2 Kent's Com. 633, 260; Stor. Agency, § 13, 14, 108, 146, 249; Combes' Case, 9 Co. 76, a & n (D); Ingram v. Ingram, 2 Atk. 88; Alexander v. Alexander, 2 Ves. Sen. 643; Solly v. Rathbone, 2 M. & S. 300; Cochran v. Irlam & als, Id. 303.)

4<sup>k</sup>. The Mode of making Contracts *by a Servant or Agent acting as such*; W. C.

1<sup>l</sup>. Doctrine at Common law.

The doctrine at common law is that the contract ought to be so expressed as to show incontestably, that it is *meant* to be the contract of the master through the servant, and not the contract of the servant himself, the *intention* legally exhibited, being always allowed to prevail. If it appears



that the agent designed to contract in the name and on the behalf of the master, the latter alone is for the most part answerable, and not the agent; whilst on the other hand, if upon the legal construction of the terms, the contract is determined to be the contract of the agent himself, and not of the principal, the latter is not to be charged, but the agent only. Men's intentions are commonly signified by language, and therefore, if the words of promise be the words of the servant, they bind *him*; and they do not bind him the less because he annexes to them the designation of *servant* or *agent*, which are regarded as merely *designatio personæ*. Thus, such expressions as, "I promise," "I, as agent for P, promise," "I, in behalf of P, promise," "I promise that P shall," &c., all import a *personal promise*, and the personal obligation of the servant or agent, which is not in the slightest degree obviated by his describing himself as agent or servant (3 Rob. Pr. (2d Ed.), 63 & seq; Combe's Case, 9 Co. 76 b; Frontin v. Small, 2 Ld. Raym. 1418; Appleton v. Binks, 5 East. 148; Burrell v. Jones & al, 3 B. & Ald. (5 E. C. L.) 47; Kennedy v. Gouveia, 3 Dowl. & Ry. (16 E. C. L.) 503; Taft v. Biewstet, 9 Johns. 334-'5; Duval v. Craig, 2 Wheat. 45; McWilliams v. Willis, 1 Wash. 202; Early v. Wilkinson & al, 9 Grat. 68). But see 1 Am. L. C. 604; W. C.

1<sup>m</sup>. Where the Contract, *in the body of it*, is in terms, in the *name of the Master or Principal*.

When the body of the contract is *in terms*, in the name of the principal (as it always should be), the *mode of signing* is quite a matter of indifference. It may be either "Principal, by Agent," or, "Agent for Principal. (Jones' Devisees v. Carter, 4 H. & M. 184; Wilks & als v. Back, 2 East. 142; Stinchcomb v. Marsh, 15 Grat. 209; Smith v. Morse, 9 Wal. 82.)

2<sup>m</sup>. Where the Contract, *in the body of it*, employs the pronouns "I" or "We."

Where the contract, in the body of it, instead of saying "The Principal promises," &c., expresses that "I promise," or "We promise," the *mode of signing* is most material.

If the signature in such case be "Principal by Agent," the personal pronoun is interpreted to refer to the *principal* or *master*, and consequently,

he alone is answerable; but if it be "Agent for Principal," it interprets the pronoun to refer to the *agent*, and it is then he who promises, and who is accordingly liable. And this liability is *exclusive*, if the promise is *under seal*; and if it be not under seal, is shared with the principal, who may be subjected upon the ground that the contract redounds to his benefit, unless it exceeds the agent's authority, or unless the credit was given *solely and expressly* to the latter. (2 Kent's Com. 621; 3 Rob. Pr. (2d Ed.) 60 & seq; Bac. Abr. Leases (I), 10; Id. Authority (C); Combe's Case, 9 Co. 76 b; Frontin v. Small, 2 Ld. Raym. 1418; Appleton v. Binks, 5 East. 148; Lessee of Clark & al, v. Courtney &c., 5 Pet. 349; Harts-horne v. Whittles, 3 Munf. 357; Martin v. Flowers, 8 Leigh, 161-'2.) And even where the credit is given solely to the servant, if it be in ignorance of who the principal is, although with knowledge that the servant is acting in behalf of another, and much more if without such knowledge, the principal, when discovered, is liable. (Nelson v. Powell, 3 Dougl. (26 E. L. C.) 410; Addison v. Gandassequi, 4 Taunt. 579; Paterson &c. v. Gandassequi, 15 East, 62; Thomson v. Davenport, 9 B. & Cr. (17 E. C. L.) 78.) And it is to be observed that parol evidence is admissible, to show who is the principal, when he is undisclosed by the contract (supposing it to be *not under seal*), either in order to have the benefit thereof, or to be charged therewith, but not to *discharge the agent*; for that would be to *alter a writing by parol*, contrary to one of the fundamental rules of evidence. (3 Rob. Pr. (2d Ed.) 54-'5; 1 Pars. Cont. 48; 2 Smith's L. C. 222, notes; Mechanic's Bank v. Bank of Columbia, 5 Wheat. 326; Addison v. Gandassequi, 4 Taunt. 579; Thomson v. Davenport, 9 B. & Cr. (17 E. C. L.) 78; Higgins v. Senior, 8 M. & W. 844; Turner v. Lucas' Ex'or, 13 Grat. 712.)

2<sup>1</sup>. Doctrine *by statute* in Virginia, as to the *Mode of making Contracts*.

The statute applies to *conveyances alone*, and provides that, "if in a *deed* made by one as attorney in fact for another, the *words of conveyance*, or *the signature* be in the name of the attorney, it shall be as much the principal's deed as if the *words of conveyance* or *the signature* were

in the name of the principal by the attorney, if it be manifest on the *face of the deed* that it should be construed to be that of the principal to give effect to its intent." (V. C. 1873, c. 112, § 3.)

5<sup>k</sup>. Effect of *Declarations* made by Agents or Servants as evidence against Masters.

Declarations made by agents or servants during the progress of the business, *dum fervet opus*, are admissible against the master, but not declarations made at other times. (Smith's Ex'or v. Betty, 11 Grat. 763; Packet Co. v. Clough, 20 Wal. 541; Ins. Co. v. Mahone, 21 Wal. 157; Continental Ins. Co. v. Kasey, 25 Grat. 274; Ins. Co. v. Wilkinson, 13 Wal. 235.)

2<sup>l</sup>. Liability of *Servant* on Contracts made by him on behalf of his Master; W. C.

1<sup>k</sup>. The General Doctrine.

In general, all contracts made on behalf of the master, by a servant or agent, within the scope of his authority, whether express or implied, bind the master or principal; but the servant or agent is *in no wise liable therefor*. It seems, indeed, that if he has styled himself *agent* in the contract, and has named his principal, he is *estopped*, notwithstanding he is himself the *real principal*, afterwards to claim as such; at least unless the other party has treated him as principal. (Bac. Abr. Mast. & S. (K); 3 Rob. Pr. (2nd Ed.) 56; 2 Kent's Com. 630; Bickerton v. Burrell, 5 M. & S. 383; Rayner v. Grote, 15 M. & W. 359.)

2<sup>m</sup>. Exceptions to the General Doctrine.

The exceptions to the general doctrine include the case, (1), Where the contract is in the *servant's own name*; (2), Where there is no principal, or none is disclosed; (3), Where the servant or agent exceeds his authority; and (4), Where the agent or servant is dealing for a foreign principal or master. (3 Rob. Pr. (2nd Ed.) 50, &c.; Id. 71-'2; 1 Pars. Cont. 54 & seq.)

W. C.

1<sup>l</sup>. Where the Contract is in the *Servant's own Name*.  
W. C.

1<sup>m</sup>. In the case of *Agents of Government*.

Servants of government are not in general personally liable upon contracts made in that capacity, whether under seal or not under seal, although the engagement be couched in terms which in the case of agents of private persons would charge

them individually. They are responsible *personally* only when they absolutely and unqualifiedly undertake to be so, and the presumption is always against such undertaking.

This is perhaps in part because the resources of government are in general so superior to those of an individual, that, in the absence of an explicit and unequivocal undertaking to be *personally answerable*, the credit is reasonably presumed to be given to the government; but the doctrine depends principally on *considerations of policy*, for else no man would accept an office of trust under government. In such posts large contracts must often be made, and if in the inadvertence occasionally occurring with the most guarded persons, from the pressure of business, a government officer were liable in his private fortune, wherever the words of the engagement seemed to be his rather than those of the government, the risks incident to the service would be greater than the most desperate place-hunter, who had anything to lose, could afford to take. (Bac. Abr. Master & S. (L); 3 Rob. Pr. (2nd Ed.) 55; Macbeth v. Haldiman, 1 T. R. 172, 182; Union v. Wolseley, 1 T. R. 678; Rice v. Chute, 1 East. 519; Syme v. Butler, 1 Call. 105; Tutt v. Lewis' Ex'ors, 3 Call. 233; Hodgson v. Dexter, 1 Cr. 345; Parks v. Ross, 11 How. 374.)

2<sup>m</sup>. In the case of agents of private persons; W. C.

1<sup>a</sup>. Where the Servant's undertaking is *under seal*.

Where the servant or agent contracts *under seal*, not in the name of his master, but *in his own name*, although he states it to be on the part or behalf of, or as agent for another, he is, as we have seen, *personally bound*. So, also, it is when he contracts in the same way, although it be as president, director, or member of a committee of an association, incorporated or otherwise. And even in the case of a government servant, where he *clearly intends it*, he is personally responsible. (Appleton v. Binks, 5 East. 148; Combe's Case, 9 Co. 76 b; 3 Rob. Pr. (2d edit.) 60; *Ante*, p. 210, & seq.)

2<sup>a</sup>. Where the Servant's undertaking is *not under seal*.

If in a *written contract*, not under seal, the servant uses language whose legal effect is to charge him personally, he is liable accordingly, and he

cannot exonerate himself by extrinsic proof that his purpose was to contract on behalf of his *principal exclusively*, and not to bind himself, and that the other party knew it. That would contravene the established rule of evidence which forbids that any writing shall be contradicted by parol evidence. But whether the legal effect of the language of the instrument is to charge him or not is a question of construction, which must be resolved in each case on its particular phraseology. The *intention* of the parties is the guiding star, and that must be collected from the instrument itself, by a reasonable exposition of its contents. (3 Rob. Pr. (2d edit.) 62; 1 Pars. Cont. 54, & n (a); Burrell v. Jones, 3 B. & Ald. (5 E. C. L.) 47; Iveson v. Connington, 1 B. & Cr. (8 E. C. L.) 160; Spittle v. Lavender, 2 Brod. & B. (6 E. C. L.) 453; Norton v. Herron, 1 Carr. & P. (11 E. C. L.) 648; Tanner v. Christian, 4 El. & Bl. (82 E. C. L.) 591; Drake v. Beckham, 11 M. & W. 315; Early v. Wilkinson, 9 Grat. 68.)

But whilst parol testimony is inadmissible in order to *discharge* the servant or agent who has thus contracted in his own name, it is allowed (on the same principle as against a *dormant partner*), in order to charge a principal who was unknown to the other contracting party at the time of the contract; for if he were then known, and the contract were still in terms with the agent, it is proof that the credit was given to the latter alone. Such evidence, it will be observed, does not *alter the contract* as to the agent. It shows only that another is bound *as well as he*. (3 Rob. Pr. (2d edit.) 54; Higgins v. Senior, 8 M. & W. 844; Townes v. Lucas' Ex'or, 13 Grat. 710; *Ante*, p. 211.)

2<sup>1</sup>. Where there is no *Principal*, or *none is disclosed*.

In this case, the servant or agent is liable personally, although the master or principal, if there be one, may also be subjected, when he is discovered, supposing the contract to be *not under seal*. To this class of cases belong contracts by an agent for an *unincorporated association*, such as a jockey-club. Such an association has, as a body, no existence in law, and it is not supposed that credit was given to the several members individually,

numerous, dispersed, and often unknown. (1 Cont. 55-'6; Thompson v. Davenport, 2 Sn L. C. 223, note; Cullen v. Duke of Queensb 1 Bro. C. C. 101, and n †; McWilliams v. W 1 Wash. 201; Presb. Church v. Manson & Rand. 198; Lyons v. Miller, 6 Grat. 427.)

This class of cases, in respect to the liability of the agent, may be *resolved into three*, namely

1st. Where the agent makes a *fraudulent* representation of his authority, designing to deceive;

2d. Where he *knows he has no authority* nevertheless enters into the contract as if he had;

3d. Where not, in fact, having authority, *bona fide* believes that he has, and makes the contract under that belief.

In all these cases the agent is, it seems, *primarily* liable; in the last, because, as the loss falls somewhere, it should rather rest on him who has assumed, however innocently, yet falsely he possessed authority, and thereby occasioned mischief. (1 Pars. Cont. 56, & n (e); Smo Ilberry, 10 M. & W. 9.)

On the other hand, the undisclosed principal when the contract is *not under seal*, may sue forward and claim the benefit of his agent's actions in his behalf, yet not so as to interfere with any equities which may have arisen between the agent and a third person, before the fact was known to be merely an agent. (3 Robt (2d Ed.) 34, & seq.; Sargent v. Morris, 3 B. & (5 E. C. L.) 277; Skinner v. Storks, 4 B. & (6 E. C. L.) 437; Cothay v. Fennell, 10 B. & (21 E. C. L.) 671; Phelps v. Prothen, 7 J. (81 E. C. L.) 394; Roborn v. Drummond, 2 Ald. (22 E. C. L.) 308; Sims v. Bond, 5 B. & (27 E. C. L.) 393.)

3<sup>d</sup>. Where the Servant or Agent *exceeds his authority*.

Where the servant or agent exceeds his authority, the master or principal, as we have seen, is in general not liable, and *the servant or agent*. Indeed, the master, where the authority is substantially pursued, is never liable for the mischief as made by the servant; although of course he may become answerable in consequence of subsequent actual or implied ratification; but

should be observed that such subsequent ratification in no wise *exonerates the servant*. (1 Pars. Cont. 54 & seq.; 1 Tuck. Com. 90, B. I; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494; Palmer v. Stephens, 1 Den. (N. Y.) 471.)

It is a question in these cases, as well as in those arising under the preceding head (2<sup>1</sup>), how the agent or servant is to be charged; whether on the *contract*, which he has professed to make *as agent*, or for the *deceit* practised by him in falsely pretending an authority which he did not in truth have; or upon an *implied undertaking* that he was really possessed of the power which he exercised. The better opinion seems to be that the *contract is void*;—not binding on the *principal*, because he gave no authority, nor on the *agent*, because he made no promise *for himself*;—and that the agent must either be charged in a *special action on the case for the deceit*, alleging and proving the *scienter* (that is, his *knowledge* that he had no authority;) or else, and better, in an action of trespass on the case in *assumpsit* upon an *implied contract* that he was clothed with power to do the act in question. (3 Rob. Pr. 71-'2; 1 Pars. Cont. 58; Polhill v. Walter, 3 B. & Ald. (23 E. C. L.) 114; Jenkins v. Hutchinson, 13 Ad. & El. N. S. (66 E. C. L.) 751; Lewis v. Nicholson, 18 Ad. & El. N. S. (83 E. C. L.) 511; Rondall v. Trimen, 18 Com. B. (86 E. C. L.) 793-'4; Thompson v. Bond, 1 Campb. 6, 7.)

4<sup>1</sup>. Where the Agent or Servant is dealing for a *foreign Principal or Master*.

It seems that it is, in every case, a question of *intention*, to be gathered from the contract itself, and the surrounding circumstances, whether the agent of a foreign principal is personally liable or not. There is no *rule of law* that he shall be so liable. The fact that the principal is a *foreigner* is of some weight in a doubtful case, to determine to whom *credit was given*, but the ultimate question is, did the agent design to bind himself, or to bind his principal alone, and if the contract be *in writing*, that question must be resolved mainly *by its terms*. (3 Rob. Pr. 59; Mahone v. Kekulé, 14 Com. B. (78 E. C. L.) 396; Green v. Kopke, 18 Com. B. (86 E. C. L.) 558; Lennard v. Robinson, 5 El. & Bl. (85 E. C. L.) 130.)

2<sup>b</sup>. *Rights of Master and Servant, respectively, in respect to Contracts made by the Servant, as such; W. C.*

1<sup>a</sup>. *Rights of Master in relation to Contracts made by Servant, as such; W. C.*

1<sup>k</sup>. *Rights of Master, where the Contract is by Deed.*

No advantage at common law can be taken by the master, *in a court of law*, of a contract *under seal*, made by his servant in his behalf, unless he is expressly *a party thereto*. So that; if the servant thus contracts, although professedly for the master's benefit, but without naming him as a party, the action *at law* can be maintained only in the servant's name, and not in that of the master. The latter's only remedy, if he has any at all, is in the *court of equity*. (1 Pars. Cont. 53; *Ross v. Milne & ux*, 12 Leigh, 204.) But in Virginia it is now provided by statute that if "a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain *in his own name* any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." (V. C. 1873, c. 112, § 2.)

2<sup>k</sup>. *Rights of the Master where the Contract is not by Deed.*

Where the contract is *not by deed*, an undisclosed principal may claim and enforce the benefit of the contract; save only that he shall not impair nor injuriously affect any equities or rights acquired by the other contracting party in respect to the agent, without notice, and in ignorance that he was merely an agent. (1 Pars. Cont. 53; *Warner, &c., v. McKay*, 1 M. & W. 591, 600; *Seins v. Bond*, 5 B. & Ald. (27 E. C. L.) 389; *Rabone v. Williams*, 7 T. R. 360, n (a); *Stracy, &c., v. Decy*, 7 T. R. 361, n (c); *George v. Clagett*, 7 T. R. 359.)

2<sup>a</sup>. *Rights of Servant in relation to contracts made with him as such.*

When the servant has contracted *in his own name* he may sue thereon, as the un-named master may likewise (1 Pars. Cont. 53; 3 Rob. Pr. (2d edit.) 34, & seq.); but if in a contract he styles himself *agent*, and names his principal, he is *estopped* afterwards, as we have seen, to claim as principal in the transaction, notwithstanding he may be really such; at least unless the other party has treated him as prin-



cipal. (*Bickerton v. Burrell*, 5 M. & S. 383; *Raynor v. Grote*, 15 M. & W. 359.)

2<sup>d</sup>. Doctrine touching *torts* committed by Servants in connection with their employment.

We must observe, (1), The liability of a master for *torts* committed by a servant in connection with his employment; and (2), The liability of servants for *torts* committed by them in the course of their employment;

W. C.

1<sup>h</sup>. Liability of a *Master* for *torts* committed by a Servant in connection with his employment.

The general principle is that a master is responsible for the *tortious* acts of his servants which were *done in his service*. (1 Bl. Com. 431; 1 Pars. Cont. 87; *Laugher v. Pointer*, 5 B. & Cr. (12 E. C. L.) 547);

W. C.

1<sup>l</sup>. Grounds and limits of the Master's liability.

The *grounds* of the master's liability are that he may and ought to *control his servants or agents, whom he selects and may discharge*; and that the policy of society requires that he should be answerable for their *tortious* acts whilst in his employment, and thus subject to his authority. And his liability is *limited* by similar considerations. Hence, whilst the master is answerable for the *fraud, negligence, and want of skill* of the servants who are engaged about his business, he is not liable for their *wilful and malicious* trespasses which he did not authorize, or afterwards sanction; save in the case of *carriers and innkeepers*, who, from peculiar considerations of public policy, are responsible as *insurers* of the chattels committed to them, for even the *wilful torts* of their servants. Hence, also, he is not liable for the acts or omissions of a *contractor or sub-contractor*, unless the act to be done be itself unlawful, or necessarily involve in its performance what is unlawful, or what imminently endangers the commission of *what is unlawful*, as, for example, the commission of a nuisance. (1 Bl. Com. 431, & n (26); 1 Pars. Cont. 87, & seq., & n (aa); *Id.* 89, & seq.; *Quarman v. Burnett*, 6 M. & W. 499; *Rapson v. Cubitt*, 9 Id. 710; *Milligan v. Wedge*, 12 Ad. & El. (40 E. C. L.) 737; *Overton v. Freeman*, 11 Com. B. (73 E. C. L.) 867; *Ellis v. Sheffield Gas Co.* 2 El. & Bl. (75 E. C. L.) 767; *Chicago v. Robbins*, 4 Black. 418, 428; *Robbins v. Chicago*, 4 Wal. 657, 679; *Water Co. v. Ware*, 16 Wal. 576-'7.)

2<sup>1</sup>. Various instances of torts by Servants; W. C.1<sup>k</sup>. Torts by *deceit or fraud* of the Servant.

The master is, in general, liable in an action *ex contractu*, but not in an action of *tort*, for any fraud or deceit practised by his servant or agent touching his business, although he knew not of it, nor was in any wise actually privy thereto; for as somebody must be a loser by it, it is fitting that it should be he who had the selection of the agent, and who reposed the confidence. Thus, a purchaser who has suffered by the deceit or fraud of the agent of the vendor, may upon that ground cancel the contract of purchase, supposing that he can put the vendor *in statu quo*, or if the purchase has not been consummated, he may resist an action to enforce it, the principal being allowed to retain no benefit which he has obtained through the fraud of his agent. But if, instead of seeking to set aside the contract, the purchaser prefers to bring an action for damages, it must be instituted against the *agent only*, and cannot be maintained against the *innocent* principal. Where, however, the principal knowingly accepts the benefit of the agent's act, he is always liable therefor, as if he had previously authorized it. (1 Pars. Cont. 62-'3; *Hern v. Nicholas*, 1 Salk. 289; *Grammar v. Nixon*, 1 Str. 653; *Crump v. U. S. Mining Co* 7 Grat. 353; *Harvey's Adm'r v. Steptoe's Adm'r*, 17 Grat. 303; *Udell v. Atherton*, 7 Hurlst. & N. 172; *Benj. Sales*, 347, & seq.)

2<sup>k</sup>. Torts effected by the Servant or Agent *otherwise than by fraud or deceit*; W. C.1<sup>l</sup>. Injuries arising from the Servant's *Ignorance, Unskilfulness, or Neglect*.

The master is always answerable for the damages sustained by third persons, in consequence of the ignorance, unskilfulness or neglect of his servant, in the course of his employment, and although the act or default were without the master's knowledge, or even in despite of *his express orders*. (1 Bl. Com. 431, and n (26); *Bac. Abr. Mast'r & S.* (k); 1 Pars. Cont. 87, n (aa); *Phil. & R. R'l R'd Co. v. Derby*, 14 How. 486.)

But it is sometimes an embarrassing question, *who is the master*—that is, who has the *control* of the servant at the time when the tort occurs? The servant cannot be at once in the employment and under the control of different and unconnected parties, *in the same particular*, but he may be in some re-

spects the servant of one person, and at the same time, in other respects, the servant of another. Thus, where the owner of a carriage hired horses for a day of a stable-keeper, who also provided a driver, and by the negligence of the driver, an injury was done to a third person, it was held that the stable-keeper was the driver's master, and therefore answerable, and not the owner of the carriage. (*Laugher v. Pointer*, 5 B. & Cr. (12 E. C. L.) 547; *Quarman v. Burnett & al*, 6 M. & W. 508.)

2<sup>1</sup>. Injuries arising from the *wilful and malicious conduct of Servants*.

The master is not in general answerable for the *wilful and malicious torts* of his servants, even though perpetrated whilst they are engaged about his business, because such torts cannot fairly be said to be *committed in his service*, nor has he that *power of control* with respect to such conduct, which, as we have seen, is the ground of his liability in all cases. (1 Pars. Cont. 87, and n (aa); *McManus v. Crickett*, 1 East. 106; *Croft & al v. Alison*, 4 B. & Ald (6 E. C. L.) 590; *Lyons v. Martin*, 8 Ad. & El. (35 E. C. L.) 512; *Harris v. Nicholas*, 5 Munf. 483.)

To the general proposition that a principal is not liable for the wilful and malicious torts of his servant or agent, but two exceptions are now recalled, namely, in the case of *carriers, and of innkeepers*; who, as we have seen, are from considerations of public policy, liable for all losses of and injuries to chattels committed to their charge in those capacities respectively, howsoever the loss or injury may have happened, unless it arose directly from an act of God, of a public enemy, or of the owner of the goods; and in the instance of the innkeeper, with two or three exceptions besides; and therefore are answerable even for wilful trespasses done to the chattels by their servants. (1 Pars. Cont. 87, n (aa); Stor. Bailments, § 470, 507, 510.)

3<sup>1</sup>. Torts arising to a Servant, from *neglect, unskilfulness, or ignorance of a fellow-servant*.

A servant cannot subject the master for injuries occasioned by the neglect, unskilfulness, or ignorance of a *fellow-servant* employed about the same work, provided the sufferer be *actually* engaged in *the master's service*, and transacting his business,

at the precise time when the injury is inflicted; and provided also, the master has used due precaution in employing *competent persons* to serve him. (Priestly v. Fowler, 3 M. & W. 1; Hutchinson v. R'lway Co., 5 Excheq. 351; Wigmore v. Jay, Id. 351; 1 Am. L. C. 620; Union Pac. R. R. Co. v. Fort, 17 Wal. 557; Packet Co. v. McCue, Id. 513.).

If the master is supposed to be liable in such a case, in consequence of his having retained incompetent servants in his employment, the declaration should be a special one founded on that negligence. (Wigmore v. Jay, 5 Excheq. 358, n.)

This doctrine, which seems not to have the unreserved approval of the Supreme Court of the United States, proceeds on the theory that the servant, in entering the employment of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. (Hutchinson v. R'lway Co. 5 Excheq. 351-'2; Union Pac. R. R. Co. v. Fort, 17 Wal. 557.)

2<sup>h</sup>. Liability of *Servants* for Torts committed by them in the course of their employment; W. C.

1<sup>l</sup>. Liability of Servants to *Strangers*.

Where the servant, whilst in his master's employment, commits a *tort* against a stranger, he is himself personally answerable therefor, as the master also is, unless the tort be *wilful or malicious*, in which case the master is excused, as we have seen, because, *constructively*, the servant (as to the act complained of) was not *in his service*, nor subject to *his control*. (Bac. Abr. Master & S (L); Hutchinson v. R'lway Co., 5 Excheq. 350.)

It is *said* that the servant is not answerable to strangers for injuries resulting from his *fraud or deceit* in his master's behalf, or from *ignorance, unskilfulness, or neglect* in the course of his employment, for all which, according to this doctrine, the master alone is responsible. (Bac. Abr. Master & S., (C L.); 1 Bl. Com. 431, n (24).) This may be true enough where the servant, if charged at all, must be charged upon the ground of *contract*; for there is in such cases no contract with the *servant*, either express or implied. But where the servant may be sued as for a *tort*, it would seem that he must

be personally liable in all the cases named, because, although the *stranger* may treat the act of the servant as the act of the master, the servant himself, whose default is the cause of the wrong, cannot pretend to do so, and he must, therefore, stand chargeable with whatever injury has resulted therefrom. (Hutchinson v. R'lway Co., 5 Excheq. 350.)

2<sup>d</sup>. Liability of Servants *to the Master*.

The servant is not only liable to the master for all injuries proceeding directly from his mal-feasance and non-feasance, but also for all losses which the master may sustain by recoveries had from him on account of the default of the servant towards others; *e. g.* by his false and fraudulent conduct, or by his ignorance, neglect, or unskilfulness. (Bac. Abr. Master & S. (M), 1.)

3<sup>d</sup>. Doctrine touching the Servant or Agent *dealing for his own benefit* with the subject of the Agency.

It is in no case admissible for an agent or servant to deal *for his own benefit* with the subject of the agency. Such dealing would afford so many opportunities to deceive and defraud the master or principal, and would offer such temptations to the servant or agent, that, upon considerations of policy, it is inhibited altogether, and such transactions, however fair they may in fact be, are pronounced *constructively* fraudulent, and therefore voidable at the instance of the principal. Hence, an agent to *sell property* cannot buy it for himself, nor can an agent to *buy*, purchase what belongs to himself. If this rule be violated, the transaction, at the instance of the principal, will be annulled, unless, with a full knowledge of all the circumstances, he has subsequently ratified it; whilst it is binding upon the agent, if the principal chooses to enforce it. Nor do third persons who acquire an interest in the transaction, from the agent, with notice, or with the means of knowledge, of the agent's violation of duty, stand in a better situation than the agent himself. The principal has the option, as to them also, of invalidating the transaction. It should be observed, however, that when the principal elects to annul what the agent has done, he must re-pay him whatever sums of money he has disbursed on account of the business. (1 Pars. Cont. 75-'6; Fox v. Mackreth, 1 Wh. & Tud. L. C. 125 to 169; Morris & al v. Terrell, 2 Rand. 6; Moseley's Adm'rs v. Buck & al, 3 Munf. 232; Buckles v. Lafferty's Legatees, 2 Rob. 292; Segar v. Edwards & ux, 11 Leigh, 218; Bailey's Adm'r v. Robinson, 1 Grat.

4, 9; Wellford v. Chancellor, 5 Grat. 39; Stainback v. Bank of Va., 11 Grat. 269; Same v. Read & Co., 11 Do. 281; Hunter v. Lawrence's Adm'r, 11 Grat. 111; Howery v. Helms, 20 Grat. 7.)

This rule does not apply to mere *formal trustees*, who have no active functions to perform, but are simply passive, such as trustees to preserve contingent remainders. (1 Wh. & Tud. L. C. 151; Parks v. White, 11 Ves. 209, 226); nor does it preclude an agent or trustee from purchasing the subject of the trust or agency at public auction, with the consent of the beneficiary, if he is competent to consent, or by permission of a court of equity. This permission the court is seldom reluctant to concede, taking due precautions against abuse, and grants it of course where the fiduciary's bidding (in consequence of his individual private interest being concerned in obtaining the highest price), would promote the great object of securing the most advantageous sale. (1 Wh. & Tud. L. C. 167; Davoux v. Fanning, 2 Johns. Ch. 252, 261, 262; Dehon v. Rarey, 2 Saund. 61.)

5°. Doctrine touching the termination of the Relation of *Master and Servant*.

The authority of the servant is terminated, (1), By express revocation; (2), By the servant's death, or that of the master; (3), By a change in the condition of the master; (4), By the completion of the business, or by the lapse of the time prescribed for its duration; and (5), By the occurrence of war between the countries to which the principal and the agent respectively belong;

W. C.

1°. Termination of Servant's authority by *express Revocation*.

All *mere* authorities are in their nature revocable, and cannot be made otherwise by the most express declarations to the contrary. In order to be irrevocable, the authority must be *coupled with an interest in the subject to which the agency relates*, or must be given by way of contract *for a valuable consideration*; as, for example, where the authority constitutes a part of a security for money, &c. Hence, after *advances made by a factor*, the authority given him to sell the goods of the principal consigned to him, with a view to secure those advances, is not revocable. (2 Kent's Com. 644; 1 Pars. Cont. 58 & seq. & n (h); Metcalfe v. Clough, 2 Man. & Ry. (17 E. C. L.) 178; Smart v. Sandars, 5 Man. Gr. & Scott. (57 E. C. L.) 918; Hunt v. Rousmanier, 8 Wheat. 201; Brown v. McGrau, 14 Pet. 494; Field v. Farrington & al, 10 Wal. 149.)

But notice of the revocation of authority must be given to the servant or agent, and also to the public, and especially to the persons accustomed to deal with the servant or agent as such; and his *bona fide* acts until he receives such notice, and the *bona fide* transactions of third persons with him as agent, in the absence of notice to such persons, or to the public, through the newspapers or otherwise, will be obligatory upon the master or principal. (2 Kent's Com. 644; 1 Pars. Cont. 59-'60; 1 Tuck. Com. 93, B. I; Spencer & al v. Wilson, 4 Munf. 135; Morris v. Terrell, 2 Rand. 6.)

2<sup>d</sup>. Termination of Servant's authority by *his death, or that of the master.*

The death of the servant terminates the agency, of course, because the confidence is a personal one, and cannot be transmitted to the personal representative; and so also it is when the authority is joint to two or more persons and one of them dies, the agency is ended, unless it be expressly stipulated otherwise in the power, or unless the power be *coupled with an interest in the subject matter*, or be founded on a *valuable consideration*. (1 Th. Co. Lit. 738-'9; Id. 344; 2 Kent's Com. 643.)

The death of the master terminates the agency, as it terminates, in general, all powers, *instantaneously and absolutely*, without reference to any notice to the agent, or other persons, or the possibility of notice. The only exception is where the power is *coupled with an interest in the subject matter*. The fact that it is given for a *valuable consideration* constitutes no exception to the general rule; for the act of the agent must ever be done in the *name of the principal* (Combe's case, 9 Co. 76 b), and it would be absurd that an act should be done *in the name of a dead man*. (2 Kent's Com. 646; 1 Pars. Cont. 61-'2; 2 Th. Co. Lit. 340, 344; Hunt v. Rousmanier, 8 Wheat. 201; Clayton v. Fawcett's Adm'rs, 2 Leigh, 23; Houston's Adm'r v. Cantril & al, 11 Leigh, 173; Shipman v. Thompson, Willes Rep. 105; Wynne v. Thomas, Id. 565; Watson, &c. v. King, 1 Stark (2 E. C. L.) 421; S. C. 4 Camp. 274; Houston v. Robertson, 6 Taunt. 450; Blades v. Free, Ex'or, 9 B. & Cr. (17 E. C. L.) 167; Smout v. Ilberry, 10 M. & W. 1.)

It is obvious that this doctrine, although it seems to be the logical result of well established principles, may endanger consequences anything but convenient. Thus, if one constitutes an agent with authority to provide supplies for his family whilst he goes upon a distant voyage, and during his absence he dies in a remote region,



so that intelligence of his death is not received for six months, during all which period necessities are furnished the family by order of the agent, according to the doctrine in question the decedent's estate cannot be charged, because the agency was revoked by his death (*Blades v. Free*, 9 B. & Cr. (17 E. C. L.) 167); and it is certain that the agent cannot be charged personally *upon the contract*, because he made it as *agent only*. (*Smoot v. Ilberry*, 10 M. & W. 10). The loss, then, must fall, so far as the *contract* is concerned, on the innocent tradesman. The best solution seems to be that, although the agent cannot be subjected upon the *contract* for the price of the goods furnished, he may be, by a *special action on the case*, for *deceit*, or by an action of trespass on the case *in assumpsit*, on the ground that, having represented himself, however *bona fide*, as the agent, and in that character obtained the goods, he is responsible for the truth of the representation, either as *for a fraud*, constructive, if not actual, or upon an *implied contract* that he was clothed with the requisite authority. (*Ante*, p. 216; *Thompson v. Bond*, 1 Campb. 6, 7.) This view is very well sustained by the *reasoning* of the court in *Smout v. Ilberry*, 10 M. & W. 10, in respect to the agent's being liable to an action on the case *for deceit*. It is also in conformity with several of the older cases. Thus, in *Hern v. Nichols*, 1 Salk. 289, Lord Holt held a merchant liable in an action on the case for a deceit, where it appeared that he had sold certain silk as of a particular quality, *bona fide* believing it to be so, upon the *statement of his foreign correspondent*, when it was, in fact, of an inferior description; for, says Lord Holt, "seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." So, in *Schneider & al v. Heath*, 3 Campb. 508, a ship was sold "*with all faults*" by a particular description, which turned out almost wholly untrue. The description was prepared by an agent, who did not know the falsity of it, and Mansfield, C. J., held that the sale must be vacated, for that it signified nothing "whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false." And to a like effect was the opinion of Lord Mansfield in *Pawson v. Watson*, Cowp. 788. So Lord Denman, in *Evans v. Collins*, 5 Ad. & El. N. S. (48 E. C. L.) 819, says, "the sufferer is wholly free from blame; but the party who caused the loss,



though charged neither with fraud nor negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not *know* to be true; and it is just that he, not the party whom he has misled, should abide the consequences of his misconduct." This judgment, however, was reversed by the Court of Exchequer-Chamber (5 Ad. & El. N. S. (48 E. C. L.) 827); and it must be admitted that the weight of later English authority is decidedly in favor of the proposition that in order to sustain an action *for a deceit*, the false representation must have been communicated for a *deceitful purpose*, or have been *known to be false*. (Cornfoot v. Fowke, 6 Excheq. 358; Meens v. Hayworth & al, 10 M. & W. 147; Taylor v. Ashton, 11 M. & W. 401; Wilson v. Fuller, 3 Ad. & El. N. S. (43 E. C. L.) 639; Collins v. Evans, 5 Ad. & El. N. S. (48 E. C. L.) 826; Pasley v. Freeman, 3 T. R. 51; Haycraft v. Creasy, 2 East. 92.) The American cases, on the other hand, favor the conclusion that an assertion, as of *one's own knowledge*, of some matter of fact which is not true, whether the person knew anything of the fact or not, renders him equally liable. "Such an averment has all the elements and all the consequences of a fraudulent representation. (Hazard v. Irvin, 18 Pick. 96, 109; Page & al v. Bent & als, 2 Metc. 371, 374; Lobdell v. Baker, 1 Id. 193, 201; Ballow v. Talbot, 16 Mass. 461; Stene v. Denny, 4 Metc. 151; Gough v. St. John, 16 Wend. 646.) In England, therefore, the action would be trespass on the case in assumpsit, upon the implied undertaking that the supposed agent had a valid authority, whilst with us it might be either an action of assumpsit or an action on the case for the deceit.

3<sup>d</sup>. Termination of the Servant's authority by a *change in the condition* of the Master or Principal.

Such a change as determines the power of the principal to control the subject matter of the agency puts an end to the agent's authority. Prominent amongst these changes are bankruptcy, lunacy, and marriage in case of a female, all of which extinguish the agency. But in these cases also, as in others, the revocation or determination of the agent's power may be arrested by its being *coupled with an interest* in the subject matter, or founded on *valuable consideration*, whereby a lien on the subject may be created, even in case of a bankrupt. (2 Kent's Com. 644-'5; Alloy, &c. v. Hotson, 4 Camp. 326.)

In case of lunacy, the existence of the lunacy must be

established by a *judicial sentence* before it will operate to revoke the power. (2 Kent's Com. 645.)

- 4<sup>f</sup>. Termination of the Servant's authority by the *completion of the business, or by the lapse of time* prescribed for its duration.

A servant or agent with power to sell goods is *functus officio* as soon as the sale is made, and cannot then change the terms so as to bind the principal; and so, whilst his declarations at the *time of sale* are good evidence against the principal, as we have seen, yet those made afterwards, although during the continuance of the agency, are inadmissible. The agent himself, however, is of course a competent witness to prove the *facts* at any time. (Blackburn v. Scholes, 2 Camp. 343; Helyear v. Hawke, 5 Esp. 74. Pete v. Hague, 5 Esp. 134; Cliquot's Champagne, 3 Wal. 140; Auditor v. Johnson, 1 H. & M. 540; Hunt v. Rousmanier, 8 Wheat. 174; 1 Am. L. C. 567.)

- 5<sup>f</sup>. Termination of the Servant's authority by the *occurrence of war* between the countries of which he and the Master are respectively subjects.

No transactions of trade or commercial intercourse are permitted between the subjects of belligerent States, *without special license*, in consequence of the mischief and abuses to which such intercourse would be liable. Hence war, for the most part, terminates all agencies (unless, perhaps, where they are *coupled with an interest*), and all partnerships; but not so as to preclude the continuance of an agency in the enemy's country in order to collect debts and to preserve property. (Hale v. Wall, 22 Grat. 430; Manhattan Life Ins. Co. v. Warwick, 20 Grat. 637 & seq.; Ward v. Smith, 7 Wal. 447, 452; 1 Pars. Cont. 178; Potts v. Belt, 8 T. R. 548; The Hoop, 1 Rob. Adm. R. 167; Griswold v. Waddington, 16 Johns. 438; Scholefield v. Eichelberger, 7 Pet. 59<sup>v</sup>.) And this principle applies as well to *civil* as to *international* wars. (Billgerry v. Branch & Sons, 19 Grat. 393.)

- 6<sup>e</sup>. Doctrine touching the liability of the Master, where *government* is concerned; W. C.

- 1<sup>f</sup>. Liability of Government for the tortious acts and defaults of its Servants.

The government is bound, like any other principal, by the *contracts* of its agents, but upon considerations of public policy, is never answerable for their *tortious acts or defaults*. The maxim *respondeat superior* is not applicable in such cases. (Lane v. Cotton, 1 Ld. Raym. 646; Whitefield v. Ld. De Spencer, Cowp. 754, 763; City of Richmond v. Long's Adm'r, 17 Grat. 378; Weightman

v. City of Washington, 1 Black. 40; Chicago City v. Robins, 2 Black. 415.)

2<sup>d</sup>. Liability of superior Government-officer for act or default of *Subordinate*.

When the subordinate is himself a *government-officer* (in contradistinction to a *private servant* of the superior), whether nominated by the superior or not, the latter is not responsible for the subordinate's act or default, such subordinate being not an agent of his, but of the government. Hence the postmaster-general is not liable for losses arising from the act or default of his deputies, nor is a deputy postmaster answerable for the default of an *official assistant*, although appointed by himself. (Lane v. Cotton, 1 Ld. Raym. 646; Whitworth v. Ld. De Spencer, Cowp. 754; Dunlop v. Monroe, 7 Cr. 242; Wilson v. Peverly, 1 Am. L. C. 621.)

On the other hand, if the subordinate be not a government-officer, but the superior's private servant, the maxim of *respondet superior* applies, and the master is responsible for his acts and defaults. (Wilson v. Peverly, 1 Am. L. C. 621.) Thus, a mail-carrier, being the private agent of the contractor, and not a government-officer, the contractor is liable for any injury sustained by third persons, through the carrier's negligence or default. (Sawyer v. Corse, 17 Grat. 230.)

This distinction is not only logical, seeing that the subordinate, when a *public officer*, is the agent, not of his chief, but of the government, but it is also rendered needful by sound policy, as well as by justice. For who otherwise would consent to take the responsibility of a public office, wherein he must have assistants, and in administering which the largest fortune might be hopelessly wrecked by the acts of persons whose conduct the superior cannot possibly, practically and effectively supervise and control. Thus is explained the responsibility of the high-sheriff for the default of his deputy (*ante* p. 97-8, 5<sup>k</sup>.) for originally the deputy was merely the *principal's servant*, and not a public officer; and the doctrine has been silently retained, notwithstanding the deputy-sheriff is now to some purposes a public officer. (Shepherd v. Lincoln, 17 Wend. 250; Wilson v. Peverly, 1 Am. L. C. 621-'2.)

But whilst the superior is not liable for the official delinquency of his *official subordinate public officer*, he is answerable for not properly superintending, and perhaps for *fraudulent* neglect in appointing him. (Dunlop v. Monroe, 7 Cr. 242; Wilson v. Peverly, 1 Am. L. C. 621.)



567; *Chicago city v. Robbins*, 2 Black 418, 428; *Robbins v. Chicago*, 4 Wal. 657, 679; *Water Co. v. Ware*, 16 Wal. 576-7; *Ellis v. Sheffield Gas Co.*, 2 El. & Blackb. (75 E. C. L.) 767; *Newton v. Ellis*, 6 El. & Bl. (85 E. C. L.) 124; *Hole v. Rlway Co.*, 6 H. & Norm. 497). See *Virginia Cent. Rl. Rd. Co. v. Sanger*, 15 Grat. 241-2.

8<sup>c</sup>. Doctrine touching the Liability of the owner of Real Property for its use for hurtful purposes.

The responsibility of the owner of real property, when used for hurtful purposes, seems to depend on, and be measured by, his *power of control*. If one let his land *with a nuisance upon it*, or for a purpose which must result *in nuisance*, he is liable for the consequences. Indeed, it may be stated generally, that the proprietor of land is bound to see to it that his property is so used and managed, whether by himself and his own immediate servants, or by contractors and their servants, as to produce no injury to others. (*Sly v. Edgely*, 6 Esp. 7; *Laugher v. Pointer*, 5 B. & Cr. (12 E. C. L.) 547; *Randleson v. Murray*, 8 Ad. & El. (35 E. C. L.) 109; *Rapson v. Cubitt*, 9 M. & Wels. 713.)

## CHAPTER XV.

### OF HUSBAND AND WIFE.

#### 2<sup>d</sup>. The Relation of Husband and Wife.

In discussing the doctrine connected with the relation of husband and wife, it will be expedient to observe, (1), The definition and character of marriage; (2), The method of contracting marriage; (3), The modes whereby marriage is dissolved; and (4), The legal consequences of marriage; W. C.

#### 1<sup>e</sup>. The Definition and Character of Marriage.

Marriage is defined to be a contract in due form of law, whereby a free man and a free woman mutually engage to live with each other during their joint lives, in the union which ought to subsist between husband and wife. (Bac. Abr. Marr. & Div.; Id. (B).)

Husband and wife, in the old law books, are styled, in the law-French dialect, *baron and feme*, and the wife, in the same dialect, is called a *feme covert* (*fœmina co-operta*), as being under the protection and cover of her husband, or perhaps by analogy to the Latin *nupta* (a nu-

*bendo*, i. e., *tegendo*), because home covered with a veil. Marriage is called *coverture*. (

The legal existence of marriage, or at least is made and upon this principle of husband and wife ("they twain shall be one") of the legal rights, duties, either of them by the marriage.

The contract of marriage is viewed in law as a purely civil contract, the most intimately affecting of all. James Mackintosh, with great force, says that the chief supports of the rights of property and marriage are the same. Marriage securely enjoys the fruits of the contract, whereby the social order is ordered as to make it "a fit nursery for the children of the state." The relative duties of husband and wife are more immediately or remotely connected with the great institutions of society. Upon their gradual progressive civilization of the whole order of social life. see also 2 Kent's Com. 75 c. 13.)

## 2°. Method of Contracting Marriage

The law, whilst it regards marriage with reverence, yet treats it as a contract, holding it to be valid in a country where the parties are *willing* and *able*, and actual solemnities required by law. (1 Bl. Com. 433.)

W. C.

## 1°. Willingness of the Parties

### 1°. The General Doctrine.

The controlling maxim is, "*nuptias facit*." (1 Bl. Com. 433.)

### 2°. Marriage-brocage Contract

Marriage-brocage contract is a contract with a view to bring about a marriage, to be therefor rewarded, to be therefor taken to negotiate it; it is deemed that marriages are made by free choice, that all such marriages were executed before or after, as being against public policy.

of confirmation); and a court of equity will decree any bond or other security founded on such a transaction, to be given up and cancelled; and in some cases has decreed money actually paid to be refunded. (Bac. Abr. Marr. & Div. (E), 3; 1 Stor. Eq. § 263, &c.)

2<sup>f</sup>. Capacity of the parties to Contract.

In general, all persons are able to contract themselves in marriage, unless they labor under certain disabilities, partial or entire. (1 Bl. Com. 434.) Let us consider: (1), The doctrine in England as to disabilities to contract marriage; and (2), The doctrine in Virginia;

W. C.

1<sup>g</sup>. Doctrine in England as to disabilities to contract Marriage.

Disabilities to contract marriage are in England either (1), Canonical impediments, rendering the marriage *voidable*; or (2), Legal disabilities, rendering it *ipso facto void*;

W. C.

1<sup>h</sup>. Canonical impediments.

Let us consider, (1), Why they are called canonical impediments; (2), The classes of canonical impediments; and (3), The effect of canonical impediments;

W. C.

1<sup>i</sup>. Why they are called *Canonical* impediments.

Because they are derived from, and determined by the *canon law*. They are styled also *ecclesiastical* impediments, because they were long cognizable in England in the *ecclesiastical courts*. They make the marriage *voidable* only, and *not void*, so that they are properly denominated *impediments*, rather than *disabilities*. The cognizance of the ecclesiastical or church courts in such cases, at common law, is founded partly upon the Romish idea that marriage is a *sacrament*, but chiefly upon the imputed sinfulness of the connection, which it is the duty of the church, through its tribunals, *pro salute animarum* (for the safety of the souls of the parties), to dissolve and put an end to. (1 Bl. Com. 434.)

Since January 11, 1858, the jurisdiction anciently possessed by the ecclesiastical courts exclusively, over matrimonial causes, has (by the Stat. 20 & 21 Vict., c. 85, and some amendatory acts), been transferred to a new court, called the "*Court for divorce and matrimonial causes*." (Wms. Pers. Prop. 492.)

2<sup>i</sup>. Classes of Canonical impediments; W. C.

The several classes of canonical impediments are (1), Pre-contract; (2), Consanguinity, or relationship





Geo. IV, c. 76, whereby it is enacted that the ecclesiastical courts shall not compel the celebration of marriage *in facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de presenti* or *de futuro*; and thus pre-contract is understood to be in England no longer a cause of avoiding a marriage, but merely a ground for an action for damages against the party in default. (1 Bl. Com. 435; 2 Steph. Com. 281.)

2<sup>k</sup>. Consanguinity.

Consanguinity is relationship *by blood*, and by Statute 5 and 6 Wm. IV, c. 54, is constituted a *legal or civil disability*. (1 Bl. Com. 434; 2 Steph. Com. 285); W. C.

1<sup>l</sup>. The degrees of kindred within which Marriage is prohibited.

The law of England follows substantially the Levitical law (Levit. xviii. 6, &c.), of which the general scope and design are to forbid marriages between persons related in the ascending and descending lines *in finitum*, and also between collateral relatives to the *third degree* reckoned by the *civil law*; collaterals of the *fourth degree*—that is, first cousins, being the nearest blood relations who are permitted to intermarry, relatives of the half-blood standing in this respect on the same footing as those of the whole blood, and bastards as those who are legitimate. (Bac. Abr. Mar. & Div. (A); 1 Bl. Com. 435, n's (4) and (5); 2 Burn's Eccles. Law, 441.)

2<sup>l</sup>. The Reasons (apart from the Divine sanction) for the prohibition of Marriage between near kindred.

Bac. Abr. Mar. & Div. (A); Montesq. Sp. Laws, B. xxvi, c. 14; Grot. de Jur. Bel. &c. B. II, c. 5, § 12 to 14; Synops. Crim. Law, 171; W. C.

1<sup>m</sup>. The corruption of Manners to which such Marriages would lead.

The necessary intimacy which exists amongst very near relations, members of the same family, might be expected to fill numberless households with lewdness, if a commerce of love, to be sanctioned by marriage, were authorized between persons so connected. (Bac. Abr. Mar. & Div. (A).)

2<sup>m</sup>. The Subversion of the natural duties between Parents and Children, &c.

Marriages between parents and children shock the universal sense of mankind, as well savage as



party, existing at the time of marriage, frustrates this expectation, the marriage is voidable, because the end of the contract cannot be answered. And if, after the marriage has been pronounced void, the party marries another, and has issue, that fact does not invalidate the sentence of divorce, nor the second marriage, for one may be *habilis et inhabilis diversis temporibus*. It is immaterial whence the impotence proceeds, whether it be congenital, or has arisen from disease or casualty. If, however, it be a natural defect, it is in general more likely to be permanent and incurable. But it must at all events have existed at the *time of the marriage*, and must not be supervenient. Nor is it available if the party soliciting a separation by reason of it knew of its existence at that time, whether in himself or in the consort. (Bac. Abr. Marr. & Div. (F); Bury's Case, 5 Co. 98, b & n (A).)

- 3<sup>1</sup>. The Effect of the Canonical Impediments; W. C.  
1<sup>k</sup>. The Effect in respect of Divorce.

The canonical impediments make the marriage *not void*, but *voidable* only, and the avoidance must be by divorce in the *life-time of both parties*, for the Ecclesiastical Courts (which, until recently, for many ages have had possession of matrimonial causes in England), proceed upon the idea of the *sinfulness* of the connection, and separate the parties *pro salute animarum*, a reason which of course ceases to be applicable when the connection has been dissolved by death. Hence, where a man had married his first wife's sister (a marriage within the prohibited degrees by the English statute), and the Bishop's Court was proceeding, after her death, to annul the marriage, and bastardize the issue, the Court of King's Bench interposed by writ of *Prohibition*, and obliged the Ecclesiastical Court to desist.

But if, during the *life-time of both parties*, a divorce is decreed for any of the existing canonical impediments (pre-contract being admitted not to be one), it invalidates the marriage *ab initio*, and by logical consequence *bastardizes* the issue. (1 Bl. Com. 434-'5; Elliott v. Gurr, 2 Phillim. (1 Eng. Ec. R.) 16.)

- 2<sup>k</sup>. Effect of the Canonical Impediments, *in respect of Issue*.

If a divorce be decreed for a canonical impediment, during the *life-time of both parties*, as has been just stated, the issue is thereby bastardized; but the spiritual courts, as already explained, will not be

permitted to bring about that result by divorce after the death of either. (1 Bl. Com. 435; Harris v. Hicks, 2 Salk. 548.)

## 2<sup>h</sup>. Legal or Civil Disabilities.

These disabilities are created, or at least enforced, by the municipal laws, and are recognized in the temporal courts. Some of them are doubtless grounded on *natural* law, but they are regarded by the laws of the land, not so much as involving any *moral* offence, as on account of the civil inconveniences they draw after them. (1 Bl. Com. 435.)

The classes of legal or civil disabilities in England are (1), Prior marriage; (2), Want of age; (3), Want of reason; and (4), Want of consent of parents and guardians;

W. C.

## 1<sup>l</sup>. The Classes of Legal or Civil Disabilities; W. C.

### 1<sup>l</sup>. Prior Marriage.

That is, having another husband or wife living; in which case, besides the penalties consequent upon it as a felonious offence, (under the name of *bigamy*, although *polygamy* would be the fitter designation,) the second marriage is to all intents and purposes *absolutely void*, polygamy being condemned both by the law of the New Testament, (Matt. xix. 4 to 9; 1 Cor. vii. 4,) and by the policy of all prudent States. (Grot. de Jur. Bell. &c., B. II, c. V, 19; 1 Bl. Com. 436.)

### 2<sup>l</sup>. Want of Age.

As this avoids (or at least renders voidable), all other contracts, on account of the imbecility of judgment in the party contracting, *a fortiori* ought it to avoid, or render voidable, this the most important contract of any.

The age of consent to actual marriage at common law, is *fourteen* in males, and *twelve* in females; and if the parties are under those ages respectively, the marriage is only inchoate, and may be avoided by either of them upon arriving at the age of consent, without any divorce or sentence of the spiritual court. If, however, upon attaining the age of consent, they continue together, they need not be married again.

If one party be of the age of consent, and the other under it, when the latter comes to the proper age, *either* at common law may disagree to the marriage, upon the principle that there must be mutuality of obligation. The doctrine is incontroverti-

ble at common law in respect to *actual marriage*, but it is in direct conflict with the principle which governs other contracts of infants, including a contract to marry *in futuro*. The general principle is that, whilst an adult is bound by a contract, an infant party thereto may avoid it at his election. (1 Bl. Com. 436; 2 Kent's Com. 78; Holt v. Ward, 2 Str. 937; *post* p. 241-'2, 2<sup>1</sup>.) And this last-named general principle is now established in Virginia by Statute. (V. C. 1873, c. 105, § 4.

### 3<sup>k</sup>. Want of Reason.

Without a competent share of understanding at the time, neither the matrimonial nor any other contract is valid, but of course it is not liable to be avoided by a subsequent privation of reason. There is the same, and no more, difficulty in determining whether there is sufficient intelligence to deal with marriage as in the common affairs of life. Hence, although a marriage with an idiot or lunatic, (except in a lucid interval), is at common law *per se* void, without any decree of divorce, yet for the good of society, as well as for the peace of mind of all concerned, it is expedient and allowed that the nullity of the marriage shall be ascertained by the sentence of a court of competent jurisdiction, which in England is the court ecclesiastical. (1 Bl. Com. 438; 2 Kent's Com. 76; Bayard v. Morpew, 2 Phill. 321; Portsmouth v. Portsmouth, 1 Hagg, (3 E. C. R.) 155.)

### 4<sup>k</sup>. Want of Consent of Parents and Guardians.

This disability is purely *statutory*. By the common law, if the parties themselves were of the age to consent, there wanted no other concurrence to make the marriage valid; and this was in accordance with the canon law.

The marriage-acts in England require the consent of the parents or guardians, wherever the parties are under twenty-one and not-widowed, and the statute 26 Geo. II, c. 33, *avoided the marriage* if such consent were not had. The subsequent statute of 4 Geo. IV, c. 76, is more lenient; and whilst it inflicts penalties for the non-observance of its provisions, it does not invalidate the marriage, being construed to be merely *directory*. Such is understood to be also the effect of the later statutes of 6 & 7 Wm. IV, c. 85; 7 Wm. IV, and 1 Vict., c. 22; and 3 & 4 Vict., c. 72. (1 Bl. Com. 437-'8, & n (17); 2 Steph. Com. 288; Bac. Abr. Marr, & Div. (C); Rex v. Bramley,



guinity and affinity; (3), Want of reason; (4), Conviction before marriage of an infamous offence, without the knowledge of the other party; (5), Pregnancy of the wife at the time of the marriage, without the husband's knowledge, by some person other than himself; and (6), Notorious prostitution of the wife, prior to the marriage, without the husband's knowledge. (V. C. 1873, c. 105, § 6, 1; Id. c. 104, § 9, 10.)

W. C.

1<sup>1</sup>. Natural or incurable Impotency of Body, existing at the time of Marriage.

The reasons for this doctrine, and the doctrine itself, are the same as at common law. (*Ante* p. 236, 4<sup>k</sup>; V. C. 1873, c. 105, § 6.)

2<sup>1</sup>. Consanguinity and Affinity.

The general principles are the same as in England, with some diversity in the details, especially in cases of *affinity*. (See *ante* p. 234—'5.) Thus, marriage is allowed in Virginia with the deceased consort's brother or sister, nephew or niece, with the wife of one's nephew, and with the *aunt's husband*, and uncle's wife. (V. C. 1873, c. 104, § 9 to 11; Id. c. 105, § 1.)

It should be observed that, in cases of *affinity*, the prohibition continues in force, notwithstanding the dissolution of the marriage out of which the affinity arose, by death or divorce, unless the divorce be for a cause which made the marriage originally unlawful and void. (V. C. 1873, c. 104, § 11.)

W. C.

1<sup>k</sup>. Degrees prohibited *to the Man*.

A man may not marry his mother, grand-mother, step-mother, sister, daughter, grand-daughter, half-sister, aunt, son's widow, wife's daughter, or her grand-daughter, or step-daughter, and niece. (V. C. 1873, c. 104, § 9.)

2<sup>k</sup>. Degrees prohibited *to the Woman*.

A woman may not marry her father, grand-father, step-father, brother, son, grand-son, half-brother, uncle, daughter's husband, husband's son, or his grand-son, or step-son, nephew, and niece's husband. (V. C. 1873, c. 104, § 10.)

3<sup>1</sup>. Want of Reason.

The principles are the same as those already explained as applicable in England. (See *ante* p. 238, 3<sup>k</sup>; V. C. 1873, c. 105, § 1.)

4<sup>1</sup>. Conviction before Marriage of an *infamous offence* without the knowledge of the other party.

V. C. 1873, c. 105, § 6.

Every felony likewise is every embraces every charge of falseh- tration of justice jury, suppression to accuse one of of a witness, and and perhaps other 1 Phil. Evid. 1 Crim. Law, 257 § 19.)

Surely, to all such very trivial these, is hardly that contract on fast maintenance and social order 5<sup>1</sup>. Pregnancy of t without the husband other than the husband

V. C. 1873, c 6<sup>1</sup>. Notorious prostitution, without t V. C. 1873, c

2<sup>b</sup>. Disabilities which void *per se*, with

1<sup>1</sup>. Prior Marriage All marriages

count of either or husband there out any decree This supposes, c has not been de sentence of a c C. 1873, c. 105,

2<sup>1</sup>. Want of Age.

In case of a the parties are t males, and twelve *during such non-marriage* shall of divorce, or at at the time of t ing, with a part lege of invalidat under the age c ing to the anal



under age, an analogy to which, as we have seen, the common law did not adhere. (V. C. 1873, c. 105, § 3, 4; *ante* p. 237, 2<sup>k</sup>.)

3<sup>l</sup>. Difference of Race—one party *White* and the other *Negro*.

All marriages between a white person and a negro are absolutely void, without any decree of divorce or legal process. (V. C. 1873, c. 105, § 1.) And a negro, it will be remembered, is one who has *one-fourth or more* of negro blood. (V. C. 1873, c. 103, § 2.)

This peremptory prohibition of the mixture of the two races in marriage has been found in the statutes of many, if not all, of these States, and amongst others of *Massachusetts*. (2 Kent's Com. 96, n b; Id. 258, n.)

3<sup>f</sup>. Actual Contract of Marriage in due form of Law.

Under this head it is proposed to consider, (1), The contract of actual marriage *in presenti*; and (2) The contract to marry *in futuro*;

W. C.

1<sup>g</sup>. Contract of actual Marriage *in presenti*.

Let us consider here, (1), The circumstances necessary to actual marriage at *common law*; (2), The circumstances made necessary to marriage in England *by statute*; (3), The circumstances prescribed by statute in Virginia; (4), The effect of foreign marriages; and (5), The proof to be judicially made of marriage;

W. C.

1<sup>h</sup>. The Circumstances necessary to actual Marriage at common law.

There is a remarkable diversity of opinion as to what is needful *at common law* to constitute an *actual marriage*, valid *for all purposes*. Upon the whole, however, it seems the better opinion in England that the contract must be between parties *free from all impediments and disabilities, per verba de presenti*, and solemnized by a *person in holy orders*. (Bright's H. & Wife, 370, & seq., 397, & seq.; Bac. Abr. Mar. & Div. (C); Broom's Max. 381, & seq.; Haydon v. Gould, 1 Salk. 119; Queen v. Millis, 10 Clark & Fin. 534; Dalrymple v. Dalrymple, 2 Hagg. C. R. 64, & seq.; Catherwood v. Caslon, 13 M. & W. 261, 264.)

But, although overruled by these cases, there is much authority for the proposition that the common law did not demand the intervention of a person in holy orders, but that a contract to marry *per verba de presenti*, without cohabitation, or *per verba de futuro*,



those of ours) were determined to be *merely dirctory*. (Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29; 2 Steph. Com. 288; 1 Tuck. Com. B. I, p. 99.)

2<sup>1</sup>. The Directions of the Statutes of Virginia; W. C.

1<sup>k</sup>. The Persons to whom the Statute is applicable.

Previous to February 27, 1866, the marriage-laws of Virginia did not contemplate nor include negroes, not even *free negroes*, at least in respect to any penalties for disregard of the laws touching license, or prohibition of bigamy, of incestuous marriages, or of lewd co-habitation; and hence, marriages of free negroes (those of slaves being void,) were governed altogether by the common law. (V. C. 1873, c. 192, § 1, 3, 5, 7; Id. c. 103, § 4; *ante* p. 164, 5<sup>1</sup>.)

By the Act of 27 February, 1866, all distinction between white persons and negroes, as to the mode of contracting marriage, is obliterated, although, as we have seen, it is still penal for a white person and a negro to intermarry. And it is provided, in order to meet the case of the colored population, especially of that part which had been slaves, that where colored persons have cohabited as husband and wife, and were then so cohabiting, (27th February, 1866,) whether the rites of marriage had been celebrated between them or not, they should be deemed husband and wife, and their children, whether born before the act or after, should be legitimate. And that if they had then ceased to cohabit, the children of the marriage, recognized by the man, should be deemed legitimate. (V. C. 1873, c. 103, § 4.)

2<sup>k</sup>. The License to Marry.

See V. C. 1873, c. 104, § 1 to 3, 7, 14 to 18.

W. C.

1<sup>1</sup>. Who shall issue the License.

The license is to be issued by the clerk of the court of the county or corporation where the female usually resides, or if the office of clerk be vacant, the *senior justice* (or as is presumed according to the existing arrangement, the *judge of the county court*,) or the mayor of the corporation; and the license is to be registered. (V. C. 1873, c. 104, § 1, 2.)

2<sup>1</sup>. The Consent of the Parent or Guardian.

If either party be under twenty-one years of age, and not before married, the consent of the father or guardian, or if there be none, of the mother, of such person is required, either person-



1<sup>m</sup>. The Minister of any *Religious Denomination*.

He is not required to be a minister of the *gospel*. A Jewish or any other minister of *religion* is competent. But he must first produce, before some county or corporation court in the State, proof of his ordination, and of his being in regular communion with his religious society; and he must also give bond, with good security, in the penalty of \$1,500, when the court will make an order authorizing him to celebrate marriage. (V. C. 1873, c. 104, § 4.)

2<sup>m</sup>. One or more Residents in any County, by appointment of the County Court.

The court of any *County*, which deems it expedient, may appoint one or more persons *resident* therein, to celebrate marriage within the same or any district thereof; and such persons, upon giving bond, as in case of a minister, may exercise the function until the order is rescinded. (V. C. 1873, c. 104, § 5.)

3<sup>m</sup>. The persons prescribed by any religious society which has no *ordained minister*.

The marriage may in such case be solemnized by the person, and in the manner prescribed by, and practised in, such society. (V. C. 1873, c. 104, § 6.)

2<sup>l</sup>. The Fee to be paid to the *Celebrant* by the Husband.

The fee is one dollar, and for exacting more a forfeiture to the party aggrieved, of \$50, is denounced. (V. C. 1873, c. 104, § 8.)

3<sup>l</sup>. Effect of Want of Authority in the *Celebrant*.

No marriage solemnized by any person professing to be authorized shall be deemed to be void, nor shall the validity thereof be in any way affected on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of the persons married, or *either of them*, that they have been lawfully joined in marriage. (V. C. 1873, c. 104, § 7.)

4<sup>l</sup>. Penalty on *Celebrant* for celebrating marriage Illegally.

*Knowingly* to perform the ceremony of marriage without lawful license, or to officiate without lawful authority, subjects the offender to confinement in jail for not more than one year, and to a fine not exceeding \$500; and to perform the ceremony



Virginia respectively, and not in accordance with the laws of the parties' domicil, from the obligation of which they designed to escape. (Stor. Conf. of L., § 87 & seq.; Id. 113, 121; 2 Kent's Com. 91 & seq.; 2 Pars. Cont. 104 & seq.; Bac. Abr. Marr. & Div. (D); Dalrymple v. Dalrymple, 2 Hagg. C. R. 54; Herbert v. Herbert, 2 Id. 263.)

2<sup>1</sup>. Qualifications of the General Doctrine; W. C.

1<sup>1</sup>. When the Marriage is Incestuous or Polygamous.

Marriages condemned by the general sense and policy of civilized mankind, as at war with sound morals and social order, are not within the principle above stated; but if opposed only to the particular regulations of the country where the parties are domiciled, and where the validity of the marriage is called in question, the marriage, if lawful where it was entered into, is, notwithstanding, unimpeachable. Hence, the marriage of a brother and sister, or of an uncle and niece, although permitted by the law of the country where it took place (if there be such a country), would nevertheless be voidable in Virginia; whilst the marriage of a man to his deceased wife's sister, contracted in Virginia, would be valid in England, although prohibited by the English laws. And so the marriage of one divorced *a vinculo matrimonii* for adultery, although forbidden by the laws of Kentucky, will be valid there if contracted in Tennessee, where no such prohibition exists. (Stor. Conf. L. § 113 & seq.; 2 Kent's Com. 93; 2 Pars. Cont. 106 & seq.)

2<sup>2</sup>. When the Marriage is prohibited to be contracted even abroad, by the law of the country to which the parties belong.

In general, the laws of a country extend not in effect beyond its limits; but it is, notwithstanding, competent to a State to follow its subjects abroad, and to attach to their acts done there the same consequences as if done in their own country. Thus, the civil code of France annuls the marriages of Frenchmen contracted in foreign countries contrary to the injunctions of the French law; England denies the validity of subsequent marriages entered into after a *foreign* divorce, dissolving a previous English marriage; and the law of Virginia attaches the same consequences, in respect of punishment and invalidity, to marriages within its own prescribed degrees of consanguinity and affinity, contracted by residents of the State who *go out of it for*





2<sup>1</sup>. The bad Character, or lascivious Conduct of Plaintiff.

The bad character, or lascivious conduct of the plaintiff towards other persons, constitutes a sufficient reason for declining to fulfil the engagement to marry, provided those circumstances were *not known to the defendant* when it was contracted. Otherwise they form no defence, however they may and ought to go to *lessen the damages*. Evidence of *reputation* is receivable to prove an allegation of *general* bad character, but specific misconduct must be specifically proved. (Chit. Cont. 538-'9; Sedgw. Dam. 369.)

3<sup>1</sup>. The manifestation on the part of the plaintiff of a *coarse and brutal disposition*.

If the plaintiff, by his language concerning the defendant (the *female*), manifest such coarseness and brutality as to make it imprudent for her to commit her happiness to his keeping, it is a defence to the action, supposing her not to have been previously aware of it. (Chit. Cont. 539; 1 Pars. Cont. 549.)

4<sup>1</sup>. Bad Health of the Plaintiff.

If the plaintiff's health be such as to incapacitate for the duties of marriage, or to render it unsafe or improper, and if the fact be unknown to the defendant at the time of the engagement formed, it is a sufficient answer to the action. Thus entire deafness, blindness, or other physical incapacity in the plaintiff, supervening after the promise, or afterwards becoming known to the defendant, will excuse the refusal to consummate the engagement. (Chit. Cont. 540; 1 Pars. Cont. 549-'50.)

5<sup>1</sup>. Consent obtained by Mis-representation.

If the promise to marry were induced by false and fraudulent misrepresentations of any material fact of fortune, station in life, or previous conduct, or it would seem of antecedent condition, as widowed or otherwise, the promise is thereby invalidated. (Wharton v. Lewis, 1 Carr. & P. (11 E. C. L.) 529; Foote v. Hayne, Id. 545; 1 Pars. Cont. 550.)

6<sup>1</sup>. Release of Promise.

The subsequent release of the promise to marry is a good defence, provided it be founded on *valuable* consideration, as it would be if it were a *mutual* release. (1 Pars. Cont. 550.)

7<sup>1</sup>. Pre-engagement of Plaintiff to Another Party.

This is *said* to be a good defence, because the plaintiff ought not in justice to recover for a wrong which could only have been committed against him

or her in consequence of a similar injury which he or she had previously done to a third person. This, however, seems to be a remarkable extension of the *doctrine of set-off*, and certainly requires confirmation. (1 Pars. Cont. 550-'51.)

8<sup>1</sup>. The Death of either Party.

The breach of promise to marry so far resembles a *tort* (the action therefor being usually considered *in pœnam*), that the action is said not to survive against the promisor's personal representative, nor in favor of the promisee's, unless special damage to the *promisee's estate* is alleged and proved. (1 Pars. Cont. 552-'3; *Chamberlain v. Williamson*, 2 M. & S. 408, 416.)

7<sup>a</sup>. Damages for Breach of Promise to Marry.

In the action for breach of marriage-promise damages are reckoned to be peculiarly within the discretion of the jury, whose verdict the court is always reluctant to set aside on the ground of excessiveness, and especially if the defendant has aggravated the wrong done by impeaching the plaintiff's character unsuccessfully. But it is said that the woman cannot in this action *properly* recover for *seduction*, although, if the fact of seduction incidentally comes to the knowledge of the jury (as it will seldom in practice fail to do), and they are thereby led to augment the damages, it is not a ground for vacating the verdict. (1 Pars. Cont. 553; *Sedgw. Dam.* 369.)

3°. Modes whereby Marriage is Dissolved; W. C.

1<sup>f</sup>. Death.

Marriage is dissolved either by death or by divorce. (1 Bl. Com. 440; 2 Kent's Com. 95.)

2<sup>f</sup>. Divorce.

The doctrines concerning divorce are to be traced in connexion with (1), The several kinds of divorce; (2), The causes for the several kinds of divorce; (3), The courts charged with the cognizance of divorce causes; (4), The effects of divorce; (5), The doctrine touching foreign sentences of divorce; and, (6), Sundry matrimonial causes besides divorce.

W. C.

1<sup>g</sup>. The Several Kinds of Divorce; W. C.

1<sup>h</sup>. Divorce *a mensa et toro*.

This kind of divorce "from board and bed," merely separates the parties for an indefinite time, but always in hope of reconciliation, and without disturbing the marital relations as touching either person or property further than such separation necessarily implies.

They are still husband and wife, with all the privileges and obligations of that relation, save that of living together (unless by special order of the court which decrees the divorce, a further effect be given it); and to the wife, with all the disabilities of coverture. (1 Bl. Com. 441.)

2<sup>b</sup>. Divorce *a vinculo matrimonii*.

This divorce, "from the bonds of marriage," terminates and finally dissolves the relation, in some instances *ab initio*, so that the marriage, being annulled from the beginning, is looked upon for most purposes as having never existed; and in other instances, only from the *period of dissolution*; so that, in the latter case, whilst the matrimonial relation, with all its obligations and disabilities, is thenceforward at an end; yet whatever effects and consequences may have previously attached, especially in the nature of *vested* rights to property, remain for the most part unimpaired, notwithstanding the dissolution, unless it be specially otherwise ordered by the sentence of divorce. (1 Bl. Com. 440; Bac. Abr. Marr. & Div. (F), 3.)

2<sup>s</sup>. The Causes for the Several Kinds of Divorce.

Religion, reason and experience combine to enforce the sanctity of the marriage tie. If not held to be indissoluble altogether, it is at all events fitting, in the interests of society and of the true happiness of mankind, that it should be dissolved only in rare and extreme cases. And whilst a separation, by means of a divorce *a mensa et toro*, which it may be hoped will be temporary only, is less to be deprecated, yet even that ought to be limited to cases where it is improper or impossible for the parties to live together. Numerous causes of divorce, especially *from the bonds of marriage*, are at once a sign and a cause of moral degeneracy, and surely bode ill for the future of any society;

W. C.

1<sup>b</sup>. The Causes for the Several Kinds of Divorce in England; W. C.

1<sup>i</sup>. The causes for Divorce, *a mensa et toro*, in England.

"The repugnance of the law," says Sir Wm. Scott, the great legal oracle on this subject, "to dissolve the obligations of matrimonial cohabitation may operate with great severity upon *individuals*, yet it must be carefully remembered that the general happiness of the married life is *secured by its indissolubility*. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation,

that yoke which they know they cannot shake off; they become good husbands and wives; for necessity is a powerful master in teaching the duty which it imposes. If it were once understood that upon mutual disgust married persons might be legally separated, many couples who now pass through the world with mutual comfort, with attention to their common offspring, and to the moral order of society, might have been at this moment living in a state of mutual unkindness,—in a state of estrangement to their common offspring,—and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general public good.” (Evans v. Evans, 1 Hagg. C. R. (4 Eng. Ec. R.) 35, 36.)

The common law, therefore, acknowledges only two causes of divorce, *a mensa*, &c., namely, (1), Adultery; and (2), Cruelty, including just apprehension of bodily hurt;

W. C.

#### 1<sup>st</sup>. Adultery.

Adultery, although it is the *sole* supervenient cause allowed by the Scriptures for a *dissolution* of the marriage relation, (Mat. v. 32; Mark x. 4 to 12,) is by the common law of England, at least at present, a ground merely for a divorce *a mensa et toro*. (St. John v. St. John, 11 Ves. 532; 2 Burn’s Eccles. L. 503.)

A divorce for adultery is not obtainable if the adultery be brought about by the other party’s procurement or connivance, or if condonation is proved by the complainant’s cohabiting with the guilty consort after knowledge of the adultery, or if the defendant successfully recriminates by showing infidelity on the complainant’s part. (1 Bl. Com. 441, n (33); 2 Kent’s Com. 100, &c.; 2 Burn’s Ecc. L. 505, Beeby v. Beeby, 1 Hagg. (3 E. E. R.) 789; Reeves v. Reeves, 2 Phil. (1 E. E. R.) 125; Proctor v. Proctor, 1 Hagg. C. R. (4 E. E. R.) 292; Kirkwall v. Kirkwall, Id. 277; Timmings v. Timmings, 3 Hagg. (5 E. E. R.) 76; Rogers v. Rogers, Id. 13; Crewe v. Crewe, Id. 123.)

And it should be observed that the effect of cohabitation, as proving condonation, is less stringent on the wife than on the husband, for it is not improper that she should for a time manifest a patient forbearance. (D’Aguilar v. D’Aguilar, 1 Hagg. (3

E. E. R.) 773; Durant v. Durant, Id. 733; Beeby v. Beeby, Id. 789.)

It is an established maxim that a divorce is never to be decreed for adultery (or indeed for any other cause), upon the *confession* of the parties merely, without auxiliary proofs, experience having shown that such a practice is productive of collusion, and other flagitious frauds. (2 Burn's Eccles. L. 504-'5; Mortimer v. Mortimer, 2 Hagg. C. R. (4 E. E. R.) 310; Baxter v. Baxter, 1 Mass. 346; Holland v. Holland, 2 Mass. 154; Bailey v. Bailey, 21 Grat. 50.)

But whilst, in England, adultery by the canon law, as enforced in the spiritual court, is cause only of divorce *a mensa et toro*, it has long been customary, when, by a decree of divorce *a mensa et toro*, or by a successful action for damages against the adulterer, the fact of adultery has been *judicially* ascertained, and to have been without default in the other party, for Parliament to intervene, and by a special legislative act to grant to the injured party a divorce *a vinculo matrimonii*. (1 Bl. Com. 441, & n (34); 2 Burn's Eccles. L. 501, n (n).)

## 2<sup>k</sup>. Cruelty.

Cruelty (*sævitia*), which authorizes a divorce *a mensa et toro*, is everything which tends to *bodily harm*, and thus renders cohabitation unsafe, or as it is expressed in the older cases, which involves danger of *life, limb, or health*. It is not needful to enquire from what motive such treatment proceeds, whether from turbulent passion, or from other causes possibly not inconsistent with affection, *e. g.*, jealousy. If bitter waters are flowing, it is not necessary to explore the fountains whence they spring. If bad passions are so uncontrolled as to jeopard the consort's safety, it is immaterial from what provocation the actual violence originated. It is, moreover, not necessary that there should be *many* acts, if there is reason to apprehend that they will be repeated. It suffices that the past, upon the whole, affords a *reasonable apprehension* of bodily hurt. Although the complaint of cruelty usually comes from the wife, yet the husband is in like manner entitled to protection if he shall really need it. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 36, 37; Holden v. Holden, Id. 452; Harris v. Har-

ris, 2 Phill. (1 E. E. R.), 111; Waring v. Waring, Id. 132; D'Aguilar v. D'Aguilar, 1 Hagg. (3 E. E. R.), 773; Bish. Marr. & Div. § 490, &c.)

Negatively, what merely wounds the *mental feelings*, without being accompanied by *bodily injury*, actual or menaced; mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, or even occasional sallies of passion, which do not threaten harm, although they be high offences against morality in the married state, do not amount to legal cruelty. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 36; Carr v. Carr, 22 Grat. 173, 175.)

If the complainant (who, although usually the wife, may also be, and has sometimes been, the husband), is the aggressor, provoking ill-treatment, by violent and outrageous conduct, a separation must be denied, and the party left to reform his or her own disposition and manners, and by a change of behavior to seek to remedy the evil. If, then, there is cause to complain, the party will be entitled to the protection of the court. (Waring v. Waring, 2 Phill. (1 E. E. R.) 132; Kirkman v. Kirkman, 1 Hagg. C. R. (4 E. E. R.) 409; Bishop Mar. & Div. § 490 & seq.)

Condonation applies to cruelty, as well as to adultery; but it is in no case held so strictly against a wife as against a husband. Forbearance in her may be a virtue, and does not in general weaken her title to relief. Condonation is, moreover, always conditional, so that, if the offence be repeated, the effect of the condonation is done away with, and of course it can never be applicable to the subsequent offence. (Durant v. Durant, 1 Hagg. (3 E. E. R.) 733; D'Aguilar v. D'Aguilar, Id. 733; Popkin v. Popkin, Id. 733 n (a); Beeby v. Beeby, Id. 789; Westmeath v. Westmeath, 2 Hagg. Supp. (2 E. E. R.) 1.)

2<sup>1</sup>. The Causes for Divorce *a vinculo matrimonii*, in England.

The common law (adopting the canon) holds that marriage duly contracted is *absolutely indissoluble* for any *supervenient* cause whatsoever, not even excepting adultery. But, as we have seen, there are sundry impediments and disabilities (*ante* p. 234 & seq. 1<sup>h</sup>), and 237 & seq. 2<sup>h</sup>), which render the marriage either voidable or actually void, either because the connection is deemed to be *sinful*, or because,

whether sinful or not, it is *contrary to public policy*. In any of these cases the proper courts may pronounce a sentence of divorce *a vinculo matrimonii*, not so much invalidating the marriage as declaring the legal conclusion that it was an unlawful connection, and *never was a marriage at all*. If for any supervenient cause (*e. g.*, adultery), a divorce *a vinculo* is desired, it can be had only through means of a special act of parliament, passed for the purpose, which will ascertain and declare the law of that particular case. (1 Bl. Com. 441, & n (34); *ante* p. 256, 1<sup>k</sup>; Bac. Abr. Marr. & Div. (F) 3.)

W. C.

#### 1<sup>k</sup>. Canonical Impediments.

Consanguinity, affinity, and natural or incurable impotency of body at the time of the marriage are the causes of divorce of this class, now existing in England, pre-contract having been finally abolished as an impediment to a subsequent marriage, by statute 26 Geo. II, c. 33 (A. D. 1754), as already explained. (1 Bl. Com. 434-'5, 440; *Ante*, p. 233, 1<sup>k</sup>.)

The courts charged in England with this jurisdiction have been, until 1858, the ecclesiastical courts, which proceed in it upon the ground that, the connection being adjudged *sinful*, the offenders should be separated, and the marriage dissolved *pro salute animarum*. But when dissolved, as it is thereby judicially ascertained to have been always unlawful, it is annulled, not from the time of the sentence only, but *ab initio*. The issue, therefore, is bastardized, and all rights of property growing out of the marriage are for the most part defeated. (1 Bl. Com. 434, 435, 440.)

And since this jurisdiction was exercised by the spiritual courts purely *pro salute animarum*, they were not permitted to proceed after the death of either party; and if it were attempted, the Court of King's Bench was accustomed to award a writ of *Prohibition* to restrain it. Hence, it has come to be a settled maxim of the common law that a marriage merely *voidable* is not capable of being annulled after the death of either consort, a maxim so consonant to sound policy that it ought to prevail apart from the technical reason on which it is based. (1 Bl. Com. 434-'5; *Elliott v. Gurr*, 2 Phill. (1 E. E. R.) 16.)

By statute of 1858 (20 & 21 Vict. c. 85), the jurisdiction over matrimonial causes, so long exer-



cised by the Ecclesiastical courts, was transferred to a new court, by that statute created, styled the "Court for Divorce and Matrimonial Causes," which governs itself by the same general rules and principles as formerly prevailed in the courts ecclesiastical. (Wms. Pers. Prop. 492; 1 Broom & Hadley's Com. (B. I) 358.)

2<sup>k</sup>. Civil or Legal Disabilities.

The legal or civil disabilities which, it will be remembered, are prior marriage, want of age, want of reason, and want of consent of parents or guardians (*ante*, p. 237, & seq., 1<sup>l</sup>), make the marriage (except in the last case) *actually void* in England, without *any sentence* whatsoever. But as, in general, no prudent person would choose to determine for himself either the existence of the facts upon which the nullity of the marriage is based or their legal effect, it is not unfrequent to seek a formal decree of divorce on account of prior marriage still subsisting, want of age, and want of reason. The divorce, of course, is always a *vinculo matrimonii*, and ascertaining, as it does, that the connection was only a meretricious and not a matrimonial union, declares it to have been void *ab initio*, of course bastardizing the issue, and more entirely invalidating all rights of property connected with the marriage than even a divorce for the canonical impediments. (Bac. Abr. Mar. & Div. (F), 3; Wightman v. Wightman, 4 Johns. Ch. R. 343.)

2<sup>h</sup>. The Causes for the several kinds of Divorce in Virginia; W. C.

1<sup>l</sup>. The Causes for Divorce *a mensa et toro* in Virginia.

These are determined by the provisions of the statute upon the subject, which declares that "a divorce from bed and board may be decreed for *cruelty, reasonable apprehension of bodily hurt, abandonment or desertion*" (V. C. 1873, c. 105, § 7), which is little, if anything, more than an enactment of the common law as always administered in England in the spiritual courts;

W. C.

1<sup>k</sup>. Cruelty.

What is *cruelty* has been already explained (*ante* p. 256, 2<sup>k</sup>), and to that passage reference is now made.

2<sup>k</sup>. Reasonable Apprehension of Bodily Hurt.

This reasonable apprehension of bodily hurt is included by Sir Wm. Scott under the idea of



cruelty. It must be a *reasonable* apprehension, not an apprehension arising from an exquisite and diseased sensibility. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but they are not cases of legal relief. People must relieve themselves as well as they can by prudent resistance,—by calling in the succors of religion, and the consolation of friends,—but not the aid of the courts. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 35, 37; Popkins v. Popkins, 1 Hagg. (3 E. E. R.) 733; *Ante* p. 256-'7, 2<sup>k</sup>; Hulme v. Hulme, 2 Add. (2 E. E. R.) 27; Otway v. Otway, 2 Phill. (1 E. E. R.) 95; Oliver v. Oliver, 1 Hagg. C. R. (4 E. E. R.) 361.)

### 3<sup>k</sup>. Abandonment, or Desertion.

No period for the continuance of the abandonment or desertion (it is not perceived that there is any difference in their meaning), is prescribed, but it is certainly less than *five years*, for if it continues so long as that, it is cause for a divorce *a vinculo matrimonii* (V. C. 1873, c. 105, § 6); and if, previous to the lapse of the five years, there be a sentence of divorce *a mensa et toro*, after the expiration of that time, it may be converted into a divorce *a vinculo*. (V. C. 1873, c. 105, § 15.)

Wherever there is an actual breaking off of matrimonial cohabitation, combined with the *intent to desert* in the mind of the offender, without legal cause or excuse, a desertion is established. Of that intent the court must in some way be affirmatively satisfied. It may be proved, with more or less probability, by a great variety of circumstances; as, for instance, by leaving the consort with a *declared* intention never to return; by absence for a long time, without reasonable necessity; by making no provision for a wife, when of ability to do so; by prohibiting the consort from following, and the like. (Bish. Marr. & Div. § 506, 511, 520; Gregory v. Pierce, 4 Metc. (Mass.) 478; Bailey v. Bailey; 21 Grat. 47-'8; Carr v. Carr, 22 Grat. 168.)

In Bailey v. Bailey, (21 Grat. 47), the letters of the parties were admitted to show the husband's intention to abandon his wife, the tenor of the letters, with the circumstances, excluding, in the opinion of the court, all possibility of collusion. The conduct of the husband otherwise, was also thought, in that case, to afford sufficient proof of

his intent. He was a professional gambler, and having married his wife in July, 1865, left her in November of that year, to ply his nefarious trade in the cities, and during the next *two years* visited her *but once*, then remained only a *fortnight*, left her without taking leave, and upon returning, after her bill for a divorce was filed, spurned her offer to be reconciled, and refused to visit his ill child, lest he might meet her. (21 Grat. 52.)

2<sup>1</sup>. The Causes for Divorce *a vinculo matrimonii* in Virginia; W. C.

1<sup>k</sup>. Causes for Divorce *a vinculo matrimonii* existing at the *time of the Marriage*.

The causes of divorce *a vinculo matrimonii*, existing at the *time of the marriage*, may be thus enumerated, namely, (1) Prior marriage, when the consort still survives; (2), Want of age; (3), Difference of race, one party being white, and one negro; (4), Want of reason; (5), Natural or incurable impotency of body at the time of marriage; (6), Consanguinity or affinity; (7), Conviction of either party of an *infamous offence* prior to the marriage, without the knowledge of the other; (8), Pregnancy of the wife at the time of the marriage, without the knowledge of the husband, by some person other than he; (9), Notorious prostitution of the wife prior to the marriage, without the knowledge of the husband; and, (10), Fraud or force.

W. C.

1<sup>1</sup>. Prior Marriage, where the Consort still survives, &c.

We have seen that a marriage, where either of the parties has a consort then living, is declared to be *absolutely void*, without any decree of divorce or other legal process (V. C. 1873, c. 105, § 1; *ante* p. 241, 1<sup>1</sup>). Notwithstanding, it may be, and generally is, desirable to have a judicial sentence, ascertaining the fact of such prior marriage, especially if the party complaining contemplates marrying again. Accordingly, our statute makes provision for instituting a suit to annul the second marriage, or rather to declare it null and void from the beginning. (V. C. 1873, c. 105, § 4; Bac. Abr. Marr. & Div. (F.) 3; Wrightman v. Wrightman, 4 Johns. Ch. R. 343.)

2<sup>1</sup>. Want of Age.

The age of consent to marriage, it will be remembered, with us, as in England, is *fourteen* in

males, and *twelve* in females. And in this instance also, although the marriage is by the statute expressly declared to be absolutely void, without any decree of divorce or other legal process, if the parties separate during *non-age*, and do not cohabit afterwards, yet a decree of divorce may, notwithstanding, be obtained, and in general it would be expedient to obtain it. And it must be observed that a party who at the time of the marriage was capable of consenting, with a party not so capable, is not allowed to institute a suit for the purpose of annulling the marriage. (V. C. 1873, c. 105, § 3, 4.)

3<sup>1</sup>. Difference of Race—one party being *white*, and the other a *negro*.

This, also, is one of the three causes which *per se* invalidate a marriage, without any decree of divorce, or other legal process; but it may also be ground of divorce *a vinculo matrimonii*, if desired. (V. C. 1873, c. 105, § 1, 4.) And as in the two preceding cases (1<sup>1</sup> and 2<sup>1</sup>), so in this, it is the part of prudence to obtain such a divorce, especially if the complainant desires to marry again.

4<sup>1</sup>. Want of Reason.

The want of reason, in Virginia, renders a marriage *voidable*, but *not void*, so that a decree of divorce *a vinculo matrimonii* is indispensable in order to invalidate it; and it is believed that such decree must be obtained in the *life time of the parties*, or else that the marriage is thenceforward unimpeachable. (*Ante* p. 258, 1<sup>k</sup>; V. C. 1873, c. 105, § 1, 4.)

5<sup>1</sup>. Natural or Incurable Impotency of Body at the time of Marriage.

This renders the marriage *voidable* only, and so makes a decree of divorce *a vinculo*, during the life time of both parties indispensable, in order to dissolve it. (*Ante* p. 258, 1<sup>k</sup>; V. C. 1873, c. 105, § 6.)

6<sup>1</sup>. Consanguinity or Affinity.

The marriage being for these causes only *voidable*, a decree of divorce *a vinculo*, in the life time of both parties, is required in order to invalidate it. (*Ante* p. 258, 1<sup>k</sup>; V. C. 1873, c. 105, § 1, 4.)

7<sup>1</sup>. Conviction of either party of an *infamous offence*, prior to the marriage, without the knowledge of the other.

The marriage being *voidable only*, requires a decree of divorce *a vinculo*, in the life time of both parties, in order to avoid it. But no divorce is to

be decreed if the party complaining has cohabited with the other party after knowledge of such conviction. (V. C. 1873, c. 105, § 6; *Ante* p. 258, 1<sup>k</sup>.)

The propriety of allowing such a cause of divorce as this admits of not a little question. (See *ante* p. 241, 4<sup>l</sup>.)

- 8<sup>l</sup>. The Pregnancy of the Wife at the *time of the marriage* without the knowledge of the Husband, by some person other than he.

Here also, and for the same reason, there must be a sentence of divorce *a vinculo*, in the life time of both parties, in order to annul the marriage. But no divorce is to be decreed if the husband has cohabited with his wife after knowledge of the fact that she was *enceinte*. (*Ante* p. 258, 1<sup>k</sup>; V. C. 1873, c. 105, § 6.)

- 9<sup>l</sup>. The notorious Prostitution of the Wife prior to the marriage, without the knowledge of the Husband.

The marriage being, in such case, *voidable only*, must be annulled by decree of divorce *a vinculo* in the life-time of both parties. But no divorce is to be decreed if the husband has cohabited with the wife after knowledge of the fact that she had been, prior to the marriage, notoriously a prostitute. (*Ante* p. 258, 1<sup>k</sup>; V. C. 1873, c. 105, § 6.)

- 10<sup>l</sup>. Fraud or Force.

Every other contract being vitiated by *fraud and force*, there can hardly be a doubt that the contract of marriage is too, although our statutes make no mention of either. It seems to have been so assumed by Sir Wm. Scott, and the law is so stated by Chan. Kent, and impliedly by Lord Coke, who enumerates amongst the causes of divorce *a vinculo*, "*causa præcontractus, causa metus*," &c. (2 Kent's Com. 76; 1 Th. Co. Lit. 125; Bish. Marr. & Div. § 100 to 120; Fulwood's Case, 4 Cro. (Jac.) 493; Dalrymple v. Dalrymple, 2 Hagg. C. R. (4 E. E. R.) 44, 104; Franklin v. Franklin, with other cases in note to King v. Billingham, 3 M. & S. 259; Harford v. Morris, 2 Hagg. C. R. (4 E. E. R.) 423; Portsmouth v. Portsmouth, 1 Hagg. (3 E. E. R.) 355.)

The frauds, however, which justify a dissolution of the marriage are not deceits touching fortune, station in society, previous condition, health, &c., which form an answer to an action for not fulfilling a promise to marry. To allow any of these to vacate the relation actually assumed of husband

and wife, would be grievously injurious to society. But they are frauds relating to the *identity of the person*, and, it is believed, those only. (1 Bl. Com. 439, n (24); Wilson v. Brockley, 1 Phill. 137; Stayte v. Farquharson, 3 Add. (2 E. E. R.) 282; Bish. Marr. & Div. § 115, 116, 117, 120.)

2<sup>k</sup>. Causes in Virginia for divorce *a vinculo matrimonii* supervening after Marriage.

The causes in Virginia for divorce *a vinculo matrimonii* which supervene after marriage are these four—namely, (1) Adultery; (2) Sentence of either party to the penitentiary; (3) Indictment of either party for felony, when such party is a *fugitive from justice*, and has been *absent for two years*; and (4) Wilful abandonment or desertion *for five years*. (V. C. 1873, c. 105, § 6.)

W. C.

1<sup>l</sup>. Adultery.

The same general principles, as to adultery, prevail in Virginia as in England (see *ante* p. 255 & seq. 1<sup>k</sup>), except that in Virginia it is a cause of divorce *a vinculo*, and not, as in England, merely of divorce *a mensa*, &c. It is specially provided that the divorce shall not be granted if the parties have *voluntarily* cohabited after knowledge of the adultery, or if it occurred more than five years before the institution of the suit, or if it was committed by the procurement or connivance of the plaintiff; and also, that in granting a divorce for adultery, the court may decree that the guilty party shall not marry again, in which case the bond of matrimony is not dissolved as to that party. But this restriction the court may afterwards, for good cause, remove. Nor, indeed, will it be imposed without reluctance, experience having proved how pernicious to society is the presence in it of a husband without a wife, or a wife without a husband. (V. C. 1873, c. 105, § 6, 11, 14; 2 Kent's Com. 100, &c.; 1 Bl. Com. 441, n (33).)

2<sup>l</sup>. Sentence of either Party to the Penitentiary.

Where either party is sentenced to confinement in the penitentiary (which supposes *conviction of a felony*), a divorce *a vinculo matrimonii* may be decreed, and no pardon granted to the party sentenced shall restore his or her conjugal rights. (V. C. 1873, c. 105, § 6.)

How far this cause of divorce is warranted, by sound and politic regard to the morals and order

of society, well deserves the grave consideration of the Legislature. To the writer it seems as little to be reconciled with wise policy as with the precepts of the Scriptures. See Mat. v. 31, 32; Id xix. 5 to 10; Mark x. 7 to 12.

- 3<sup>1</sup>. Indictment of either party *for Felony*, when such party is a *fugitive from justice*, and has been *absent for two years*.

Where either party charged with an offence, punishable by death or confinement in the penitentiary (that is, charged with a *felony*, V. C. 1873, c. 195, § 1), has been indicted, is a fugitive from justice, and has been absent for two years, a divorce from the bond of matrimony may be decreed. (V. C. 1873, c. 105, § 6.)

This belongs to the same category as the preceding, and is liable to the same observation. As a more recent instance of legislation, looking in the same direction, it is yet more to be deplored. It is vain to expect that individuals will conform their conduct to even the coarser rules of morality and virtue, when the laws of the land admit and encourage a license at variance with the *spirit* of Christian teaching, and hardly to be reconciled with its *letter*.

- 4<sup>1</sup>. Wilful Abandonment or Desertion *for five years*.

Where either party wilfully abandons or deserts the other for *five years*, a divorce from the bond of matrimony may be decreed to the party abandoned; and if before the lapse of five years a divorce *a mensa et toro* be granted (as described, *ante* p. 260, &c. 3<sup>k</sup>.), it may be converted after the expiration of that time into a divorce *a vinculo*. (V. C. 1873, c. 105, § 6, 15.)

Abandonment is so grave an offence against the obligations of marriage, and so mischievous, as tending, amongst other evils, to tempt the party abandoned, if not the other also, from the paths of virtue, as to merit severe reprobation, and to afford a somewhat more sufficient reason for dissolving the marital relation than some of those previously passed in review. The Saviour appears to refer to those pernicious consequences of desertion when he says (Mat. v. 32), "Whosoever shall put away his wife, saving for the cause of fornication, *causeth her to commit adultery*." At all events, such consequences do in fact frequently result. (See *Reeves v. Reeves*, 2 Phill. (E. E. R.) 125;

Sullivan v. Sullivan, 2 Add. (2 E. E. R.) 299; Morgan v. Morgan, 2 Curt. (7 E. E. R.) 679.) It ought to be observed, however, that so profound and judicious a moralist as Sir Wm. Scott was of opinion that desertion, unless in conjunction with acts of cruelty, was *never* a ground even of separation. (Evans v. Evans, 1 Hagg. C. R. (4 E. E. R.) 119.)

We have seen (*ante* p. 260, 3<sup>k</sup>), that to constitute desertion or abandonment there must be, first, the actual breaking off of matrimonial cohabitation, and secondly, an intent to desert in the mind of the offender, without legal cause or excuse. Both must concur to complete the desertion. A mere separation by mutual consent is not desertion in either, nor, as a matter of proof, can desertion be inferred against either from the mere unaided fact that the parties do not live together; though protracted absence, with other circumstances, may establish the original intent. It is obvious, however, and follows from the established principles of evidence, that when the two necessary elements of an actual separation, and an intent to desert, are once shown, the same intent will be presumed to continue until the contrary appear. (Bish. Marr. & Div. § 506, 511; 1 Greenl. Ev. § 41, 42; Gray v. Gray, 15 Ala. 779; Bailey v. Bailey, 21 Grat. 47; Carr v. Carr, 22 Grat. 172.) The abandonment or desertion, therefore, which is cause for a divorce *a vinculo matrimonii*, differs from that which is cause for a divorce *a mensa*, &c., in nothing save only *duration*. The fact of abandonment, with the intent to desert, must be established in either case; and when it has continued for *five years* it warrants a decree of divorce from the bonds of marriage.

3<sup>g</sup>. The Courts charged with the Cognizance of Divorce Causes; W. C.

1<sup>a</sup>. The Courts which in England have Cognizance of Divorce Causes.

They were formerly the Courts Ecclesiastical, which for many ages had jurisdiction of all matrimonial causes in that country. Originally the cognizance of such causes belonged to the temporal courts, but because matrimony by the Romish Church (which, until the Reformation, was the Church of England) was deemed a *sacrament*; because also it was celebrated (at least from the time of Pope Innocent III, A. D.



1200) by a *person in orders*, whose conduct was under the Diocesan's inspection; and because, lastly, in case of the *Levitical degrees* in particular the ecclesiastics were presumed to be the best judges of the true meaning of God's law, the jurisdiction has for several centuries been vested in the church courts. (1 Bl. Com. 434, 440, 441; 2 Burn's Eccles. Law, 485.)

But in 1858, by Stat. 20 & 21 Vict. c. 85, the jurisdiction over causes matrimonial was transferred to a new court, created by that statute, styled the "Court for Divorce and Matrimonial Causes," which governs itself by the same general rules and principles as formerly prevailed in the Ecclesiastical Courts. (Wms. Pers. Prop. 492; 1 Broom & Hadley's Com. (B. I) 358.)

2<sup>h</sup>. The Courts which in Virginia have Cognizance of Divorce Causes.

There never having been any ecclesiastical courts in Virginia, matrimonial causes have always been of necessity committed to temporal courts. Except only in the instance of incestuous marriages, which are *crimes*, and like other crimes are cognizable (that is, when prosecuted as *crimes*) in the county and corporation courts, the depository of this delicate and important jurisdiction is the circuit and corporation courts, on the *chancery side* thereof. (V. C. 1873, c. 105, § 18; Id. c. 192, § 3; Id. c. 154, § 5, 38; Id. c. 155, § 2; Acts 1874-'5, p. 364, c. 271 )

But no such suit is maintainable in the Virginia courts at all, unless the parties, or one of them, is a *resident* of the State—that is, *domiciled* in it (Stor. Confl. L. § 225, 227) at the *time of bringing the suit*. (V. C. 1873, c. 105, § 8.)

Let us observe, (1), The circuit or corporation court of what county or corporation has cognizance of a divorce cause; (2), The modes of proceeding in divorce causes; and (3), The powers belonging to the court; W. C.

1<sup>l</sup>. The Circuit or Corporation Court of what County or Corporation has cognizance of Divorce causes.

The statute prescribes that the suit shall be brought in the county or corporation in which the parties *last cohabited*, or (at the option of the plaintiff) in which the *defendant resides*; or if the defendant is not a resident, then in which the *plaintiff resides*. (V. C. 1873, c. 105, § 8.)

2<sup>l</sup>. The Modes of Proceeding in Divorce Causes; W. C.



1<sup>st</sup>. Mode of Proceeding in case of *Incestuous Marriages*.

An incestuous marriage is a *crime*, and for an offence so repugnant to decency and virtue, the parties are liable to be indicted in the *law courts* (with us the county and corporation courts), which have general cognizance of crimes. Each may be fined not exceeding \$500, and imprisoned in the jail not more than six months, and the marriage is void *from the time of the conviction*. (V. C. 1873, c. 192, § 3; Id. c. 105, § 1; Acts 1874-'5, p. 364, c. 271.)

But whilst this method is provided in order to *punish and separate* the parties, for the sake of society, to which the connection is offensive, either of them may apply to the proper circuit or corporation court *in chancery*, and procure from it a sentence of nullity. (V. C. 1873, c. 105, § 6, 4.)

2<sup>nd</sup>. Mode of proceeding in all other cases than those of Incestuous Marriages, treated as *Crimes*:

The application must be made in all other cases than incestuous marriages *treated as crimes*, to the circuit or corporation courts in chancery. It may be made by either party, and the suit is instituted and conducted like other suits in equity, except that the bill shall not be *taken for confessed*, and whether the defendant answer or not, the cause shall be heard *independently of admissions* of either party, in the pleadings or otherwise. And costs may be awarded to either party, as justice may require. (V. C. 1873, c. 105, § 9.)

The object of these provisions is to prevent a divorce from being obtained by the *collusion of the parties*; and they are no more than an enactment of principles which have always prevailed in matrimonial causes, as we have seen. (*Ante*, p. 256, 1<sup>st</sup>; Bailey v. Bailey, 21 Grat. 50; 2 Burn's Eccles. L. 504-'5.) Neither the common law rule nor the statutory enactment *excludes* proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded *wholly* upon such admissions. When collusion is proved not to exist, admissions, whether verbal or contained in letters, are peculiarly satisfactory evidence; and especially is it so when the letters were written, or the verbal statements made, without reference to the controversy touching the divorce. (Bailey v. Bailey, 21 Grat. 50, 51.)

3<sup>d</sup>. The Powers of the Court; W. C.

1<sup>k</sup>. The Powers of the Court pending the Suit for a Divorce.

The court in term, or the judge in vacation, may at any time pending the suit, make any proper order, (1st), to compel the man to pay any sums necessary for the maintenance of the woman, and to enable her to carry on the suit; or (2d), to provide for the custody and maintenance of the minor children of the parties during the pendency of the suit; or (3d), to preserve the estate of the man so that it may be forthcoming to meet the decree; or (4th), to compel him to give security to abide such decree. (V. C. 1873, c. 105, § 10.)

2<sup>k</sup>. The Powers of the Court in making its Decree; W. C.

1<sup>l</sup>. In respect to the Estate and Children of the Parties.

Upon decreeing the nullity of a marriage, or a divorce, either *a mensa*, &c., or a *vinculo matrimonii*, the court may make such further decree as it shall deem expedient, concerning the *estate and maintenance* of either party, and the *care, custody, and maintenance of their minor children*; and from time to time afterwards, on the petition of either parent, alter such decree as to the care, custody, and maintenance of the children, as the circumstances of the parents and the benefit of the children may require. But it is to be understood that the court may not, by any such decree in the interest of the wife, interfere with or defeat the *vested* rights of creditors, or of *bona fide* alienees or incumbrances, which attached on the property previous to the institution of proceedings in the divorce-suit, if the husband had any right so to aliene or charge the property. (V. C. 1873, c. 105, § 12; Jennings, &c. v. Montague, 2 Grat. 350; Carr v. Carr, 22 Grat. 174.)

2<sup>l</sup>. In respect to the Separation of the Parties.

In granting a divorce *a mensa et toro*, the court may decree that the parties be *perpetually separated*, and protected in their persons and property; which shall operate upon property thereafter acquired, and upon the *personal rights and legal capacities* of the parties, as a decree for a divorce from the *bond of matrimony*—except that neither party shall marry again during the life of the other. But a decree of perpetual, or of limited separation, *may be revoked* at any time by the court which pro-

nounced it, under such regulations and restrictions as the court may impose, upon the *joint* application of the parties, and satisfactory evidence of their reconciliation, (V. C. 1873, c. 105, § 1). And a divorce *a mensa*, &c., for desertion, may after five years, if the desertion still continues, be converted into a divorce from the bond of matrimony. (V. C. 1873, c. 105, § 15.)

3<sup>d</sup>. Prohibition upon the Legislature, in Virginia, to grant Divorces.

From the foundation of the colony, the legislature in Virginia had exercised the power of granting divorces *a mensa* and *a vinculo*, by special act; nor for more than a century was there any other power known to the law by which a divorce of either kind could be brought about. In 1730, jurisdiction to pronounce a sentence of divorce, in cases of consanguinity and affinity, was conferred on the general court, composed of the governor and council, (4 Hen. Stats. 245), which jurisdiction was, after the Revolution, by act of 1788 (12 Hen. Stats. 688), transferred to the superior court of chancery, and afterwards to the superior courts of law. This exercise of power by the legislature seems to have been in imitation of the British parliament, although, as being a *judicial act*, it was substantially prohibited by the Constitution of 1776, which, in the allotment of functions to the several departments of government, specially and expressly provided that *neither should exercise the powers belonging to another*. (Va. Const. 1776, Art. 3; 1 Tuck. Bl. (Pt. II) 441, n 19.)

The legislature was a very unsuitable body to which to commit the function of granting divorces, but it seems to have exercised its authority with commendable caution. In 1827, provision was first made by law to confer jurisdiction upon the *superior courts of chancery*, to hear and determine suits for the *dissolution* of marriage, for the causes of natural or incurable impotency of body at the time of the marriage, for idiocy and bigamy; and to grant divorces *a mensa et toro* for adultery, cruelty, and just cause of bodily fear; the legislature, however, still interposing in all other cases, and even in these, when it thought fit so to do. (Acts 1826-'7, p. 21, c. 23.) And in 1848, an act was passed which, after reciting that applications to the legislature for divorces *a vinculo matrimonii* are becoming frequent, and occupy much time in their consideration, and moreover, involve investigations

more properly judicial in their nature, bestowed upon the *superior courts of chancery* jurisdiction to decree divorces *a vinculo* for *adultery* also; which was rather an impotent and narrow conclusion after so comprehensive a preamble. To this the revisal of 1849 added, as cause of divorce by the chancery court, sentence to the penitentiary for life, or for seven years or more. (Acts 1847-'8, p. 165, c. 122.) These acts, however, and especially the last but one, prepared the way for a judicious provision in the Constitution of 1851, which is found also in the Constitution of 1869 (Art. V, § 20), declaring that "the General Assembly shall confer on the courts the power to grant divorces, but shall not by special legislation grant relief." This constitutional provision made it needful to enumerate in detail all causes whatsoever, which should be sufficient, under any circumstances, to warrant a divorce *a mensa*, or from the *bond of marriage* respectively, the legislature having now no power to grant special relief; and the result was the very copious catalogue already set forth. (V. C. 1873, c. 105, § 1, 3, 6, 7, 15.)

#### 4<sup>g</sup>. The Effects of Divorce.

Let us consider the effect of divorce (1), in England, and (2), in Virginia; and in both countries in the following several aspects, namely: (1), In respect to the legal capacities and incapacities of the parties; (2), In respect to the legitimacy of the issue; and (3), In respect to the estate of the parties;

W. C.

#### 1<sup>h</sup>. The Effect of Divorce in England; W. C.

##### 1<sup>i</sup>. In respect to the *legal Capacities and Incapacities* of the Parties; W. C.

##### 1<sup>k</sup>. Effect on the legal Capacities and Incapacities of the Parties, wrought by a Divorce *a mensa et toro*.

A divorce *a mensa*, &c., does not, as we have seen, annul the relation of husband and wife; she is still a *feme covert*, and is under all the disabilities of coverture. She can make no contract binding on herself personally, cannot sue nor be sued alone, and her property remains subject, as before, to her husband's control. On the other hand, the husband continues under his marital obligation to provide the wife with necessaries, although her power to charge him *as his agent* is much circumscribed, and for the most part ceases altogether. Neither party can marry again, and the husband's control of the wife's person is necessarily suspended as long

as the separation continues. During that time, indeed, the cohabitation of the parties, without leave of the court, is regarded and punished as a contempt; and any issue which the wife may have is *prima facie* illegitimate, although that presumption may be repelled by proving the husband's access. (2 Bright H. & Wife, 262; Bac. Abr. Marr. & Div. (F).)

2<sup>k</sup>. Effect on the legal Capacities and Incapacities of the Parties, wrought by a Divorce *a Vinculo Matrimonii*.

A divorce *a vinculo matrimonii* annuls the marriage, leaves both parties free to marry again, liberates the wife from the restrictions of coverture, and enables her to bind herself personally by contracts, and to sue and be sued without her husband. It discharges her freehold estates, her terms for years (her *chattels real*), and her *choses in action*, still unreduced into possession, from the husband's dominion and control, and relieves him of all obligation to supply her with necessaries. (2 Bright H. & Wife, 364, &c.; 1 Bl. Com. 440, n (29).)

2<sup>l</sup>. In respect to the *Legitimacy of the Issue*; W. C.

1<sup>k</sup>. Legitimacy of the Issue, in case of a Divorce *a Mensa et Toro*.

As the marriage is undissolved, it follows, of course, that the legitimacy of the issue previously begotten is in no wise affected, but it is presumed that the parties obey the sentence of the court which separates them, and do not afterwards cohabit; and hence, as we have seen, if the wife have children which in the course of nature must have been begotten after the sentence, they are *prima facie* bastards, although the presumption may be repelled by proving that the husband had access. (Bac. Abr. Marr. & Div. (F.); 2 Kent's Com. 127.)

2<sup>k</sup>. Legitimacy of the Issue, in case of a Divorce *a Vinculo Matrimonii*.

It must be remembered that, in England, a divorce *a vinculo* is obtainable from the courts only for causes existing at the time of marriage, which make the connection an unlawful one from its inception. Such a divorce, therefore, *annuls* the marriage *ab initio*, and consequently bastardizes the issue. (1 Bl. Com. 440; Bac. Abr. Marr. & Div. (F.); 2 Bright's H. & Wife, 367.)

When a divorce *a vinculo*, for a supervenient cause, (*e. g.*, *adultery*), is granted, as it must be by

special act of Parliament, the act ascertains the *whole law of the case*, as to the legal capacities of the parties, the effect on their property, respectively, and the legitimacy of the issue.

3<sup>1</sup>. In respect to the *Estate of the Parties* ; W. C.

1<sup>1</sup>. Effect as to the Estate of the Parties of a Divorce *a Mensa et Toro* ; W. C.

1<sup>1</sup>. Effect *independently of any Special Order* of Court.

A divorce *a mensa*, &c., of itself operates nothing as to the property-interests of the parties. The marital rights of both remain unimpaired, *in statu quo*. (2 Bright H. & Wife, 362, &c.)

2<sup>1</sup>. Effect *by Special Order* of Court.

The courts of matrimonial causes in England are accustomed, in general, to accompany decrees of divorce *a mensa* with a decree for *alimony*. Alimony is the allowance made to a wife for her support out of her husband's estates. The amount is settled by the court, in its discretion, upon consideration of all the circumstances; allowing less where the husband has children to maintain, or when his income is derived from his personal exertions, and more where much of the property has come by the wife, where the income is derived from investments, or where she supports the children. In several instances one-third of the husband's income has been assigned, in some one-half, and in one only one-fifth. Where the husband is in fault, the court will not seek to find how light the burden may possibly be made, but what, under all the circumstances, will be a fair and just allotment. And when the wife has a separate and adequate income, or the divorce is on account of her adultery, or of her causeless or unjustifiable abandonment of her husband, alimony *may* be wholly denied. (1 Bl. Com. 441 ; 2 Bright's H. & Wife, 357 & seq. ; 1 Tuck. Com. 107, B. I. ; Bish. Marr. & Div. § 611 & seq. ; Cooke v. Cooke, 2 Phil. (1 E. E. R.) 40 ; Carr v. Carr, 22 Grat. 168, 173.)

2<sup>1</sup>. Effect as to the Estate of the Parties, of a Divorce *a Vinculo Matrimonii* ; W. C.

1<sup>1</sup>. Effect in case of a Divorce *a Vinculo*, for a cause existing at the *time of the Marriage*, in England.

It will be remembered that the common law (adopting the canon) allows a divorce from the bonds of marriage for no *supervenient* cause whatsoever, not even for *adultery* ; but only for causes

existing at the time of the marriage (see *ante* p. 257, 2<sup>1</sup>). Hence, such a divorce in England, when granted *by the courts*, always annuls the marriage from the beginning, and consequently extinguishes all the marital rights of the parties in respect to the property of one another, whether *in presenti*, as the husband's claims to the wife's chattels, or *in futuro*, as the claim to dower, curtesy, or distribution. The only qualification to this general principle is that if, before the divorce for a cause which renders the marriage *voidable*, the husband has *bona fide*, and without *collusion* with the purchaser, disposed of the wife's chattels *for value*, regard to the interests of the innocent third person requires that she should have no remedy to recover them, at least against *him*. It would seem that she might recover their value of the husband. (1 Dyer, 13 a; Gremeley's Case, 8 Co. 73 a; Cage v. Acton, 1 Lord Raym. 521; Aughtie v. Aughtie, 1 Phill. (1 E. E. R.) 201; Kelly v. Scott, 5 Grat. 479; 1 Bl. Com. 440, n (29); 2 Bright, H. & Wife, 364).

2<sup>1</sup>. Effect in case of a Divorce *a Vinculo* for a Cause Supervening *after the Marriage*.

The common law, as has been said, admits of divorce *a vinculo* for no supervening cause, not even *adultery*. The only mode of obtaining such a divorce for adultery, or other supervening cause, in England is, as we have seen, by *special act of parliament*, which itself determines, in each instance, the law of that case. (2 Bright, H. & Wife, 367.)

2<sup>a</sup>. The Effect of Divorce in Virginia; W. C.

The effect of a divorce in Virginia is to be viewed in respect, (1), To the legal capacities and incapacities of the parties; (2), To the legitimacy of the issue; and, (3), To the estate of the parties.

W. C.

1<sup>1</sup>. Effect of Divorce in Virginia, in respect to the legal Capacities and Incapacities of the parties; W. C.

1<sup>a</sup>. Effect as to the legal Capacities and Incapacities of the Parties, of a Divorce *a Mensa et Toris*; W. C.

1<sup>1</sup>. Where there is *no Decree of perpetual Separation*.

The effect is the same as in England. (*Ante* p. 271, 1<sup>a</sup>.)

2<sup>1</sup>. Where there is a *Decree of perpetual Separation*.



Such decree of perpetual separation is expressly declared by statute to operate upon the personal rights and legal capacities of the parties, as a decree of divorce *a vinculo*, except that neither party can marry again during the life of the other. (V. C. 1873, c. 105, § 13; *infra*, 2<sup>k</sup>.)

2<sup>k</sup>. Effect as to the legal Capacities and Incapacities of the Parties, of a Divorce *a Vinculo Matrimonii*.

The effect in general is the same as in England. (*Ante* p. 272, 2<sup>k</sup>; 1 Tuck. Com. 100, B. I.)

However, in granting a divorce *a vinculo*, for *adultery*, the court may decree that the guilty party shall *not marry again*, in which case the bond of matrimony shall be deemed not to be dissolved as to *any future marriage* of such party;—a restriction which the court may at any time afterwards for good cause remove. In all other particulars even the guilty party is wholly relieved of the incapacities and obligations of coverture. (V. C. 1873, c. 105, § 14; *ante* p. 264, 1<sup>l</sup>.)

It has been made a question whether divorces granted under general or by special laws are not inhibited to the States, in respect to marriages previously entered into, as *impairing the obligation of contracts* (U. S. Const. Art. I, § x, 1); but the doubt seems sufficiently resolved by the considerations that the clause in question refers to no other contracts than such as relate to *property*, or *pecuniary value*, and that divorce laws do not impair the contract of marriage, but liberate one party because the contract *has been broken by the other*. (Dartmouth Coll. v. Woodward, 4 Wheat. 629.)

2<sup>l</sup>. Effect of Divorce in Virginia, in respect to the Legitimacy of the Issue; W. C.

1<sup>k</sup>. Legitimacy of the Issue in case of a Divorce *a mensa et toro*.

The same principles are applied as in England. (*Ante* p. 272, 1<sup>k</sup>.)

2<sup>k</sup>. Legitimacy of the Issue, in case of a Divorce *a vinculo matrimonii*.

There is no need to discriminate in Virginia as to the legitimacy of the issue between divorces for causes existing at the time of the marriage, and divorces for supervenient causes; or between marriages which are *absolutely void*, without a sentence of divorce, and those which are *voidable only*. The statute declares that “the issue of marriages deemed *null in law*, or *dissolved by a court*, shall nevertheless



be legitimate"; thus wisely sacrificing logical consistency to a prudent and humane policy. (V. C. 1873, c. 119, § 7.)

3<sup>d</sup>. Effect of Divorce in Virginia in respect to the *Estate of the Parties*; W. C.

1<sup>k</sup>. Effect of a Divorce as to the *Estates* of the parties, independently of any *special order* of court; W. C.

1<sup>l</sup>. In case of a Divorce *a mensa et toro*; W. C.

1<sup>m</sup>. Where there is *no Decree of Perpetual Separation*.

The effect on the estate of the parties is the same as in England—that is, the parties remain, as to their property, *in statu quo*. (2 Bright, H. and wife, 362; *Ante* p. 273-'4, 1<sup>k</sup>.)

2<sup>m</sup>. Where there is *a Decree of Perpetual Separation*.

Such decree shall operate upon the property *thereafter acquired*, and upon the personal rights and legal capacities of the parties, as a decree for a divorce from the bond of matrimony, except that neither party shall marry again during the life of the other. (V. C. 1873, c. 105, § 13.)

2<sup>l</sup>. In case of a Divorce *a vinculo matrimonii*; W. C.

1<sup>m</sup>. Where the Divorce is for a cause existing *at the time of the Marriage*; W. C.

1<sup>n</sup>. Where the Marriage is void *per se*, without Decree.

The union having never been *matrimonial*, but only *meretricious*, and always void, confers no rights of any kind, as to property or otherwise. The woman may reclaim whatever belonged to her, from the man or his assigns, in whose possession soever it may be, unless so far as she may have authorized the alienation of it; and no claim to curtesy, dower or distribution can ever arise on either side. (Shelf. on Marr. & Div. 478; 1 Bl. Com. 436; 2 Bright, H. & Wife, 364.)

2<sup>n</sup>. Where the Marriage is *only voidable*; W. C.

1<sup>o</sup>. Where the Marriage, having been *Solemnized in Virginia*, is avoided for Consanguinity, Affinity, Insanity, or Incurable Impotency.

The statute enacts that in these cases the marriage, if *solemnized in Virginia*, shall be void from the *time it is so declared* by a decree of divorce or sentence of nullity, whereas, at common law, it was in such cases void *ab initio* as

soon as it was judicially ascertained to be illegal. Hence, as to *after-acquired* property, there can be no doubt that the marriage confers no rights in Virginia any more than in England. Neither can any marital right, touching property, exist which depends upon the continuance of the marriage; *e. g.* the right to a distributive share on the part of either in the chattels of the other when deceased. But the divorce is thought not *per se*, to affect those rights of the consort, or of others claiming under the consort, which were fixed and vested before the divorce took effect, although to be enjoyed *in futuro*. Thus, curtesy and dower, having attached by virtue of the marriage, are supposed not to be divested by the premature determination of the coverture, which is annulled not *from the beginning*, but only from the *date of the sentence*. The English cases, which seem to be of a contrary tenor, are not applicable here, because they suppose, what is always true in England,—that every divorce *a vinculo* invalidates the marriage *ab initio*. (V. C. 1873, c. 105, § 1; *Ante* p. 274, 1<sup>1</sup>).

As to those things belonging to the wife which the husband has *bona fide* aliened for value, or charged during the coverture, they are irrecoverably gone from the wife. It is so, as we have seen, in England (*ante* p. 274, 1<sup>1</sup>), where upon a divorce *a vinculo*, the marriage is annulled *from the beginning*, and it is *a fortiori* so in Virginia, in the state of the law above set forth. (2 Bright, H. & Wife, 364, &c.)

2°. Where the marriage is avoided for any other of the causes *existing at its date*, which render it *Voidable*.

The statute being silent as to the time whence a divorce *a vinculo* for those causes shall take effect, it is presumed that the common law analogy is to be observed, and as the causes existed at the time of the marriage, that the divorce invalidates it *from the beginning*. If it be so, then the same consequences follow, as to the estate of the parties, as in England. (*Ante* p. 274, 1<sup>1</sup>.)

2<sup>m</sup>. Where the Divorce *a Vinculo* is for a cause supervening after Marriage; W. C.

1<sup>a</sup>. Rights of property *actually vested* in possession, in consequence of the Marriage.

These are unaffected by the divorce *per se*, although of course they may be by an accompanying order of the court. Thus the wife's *chattels in possession* having become *vested absolutely* in the husband by the marriage, the subsequent divorce for a supervenient cause, as adultery, in no wise affects the husband's title.

2<sup>a</sup>. Rights of property which are *inchoate and attached*, but not actually in possession.

These rights, it is believed, are also unaffected by the divorce, supposing no special order to accompany it. Thus, notwithstanding the dissolution of the marriage, the husband is still entitled to *curtesy*, and the wife to *dower*, save in *after-acquired* lands. (*Ante* 278, 1<sup>o</sup>.)

3<sup>a</sup>. *Choses in action* of the Wife.

These, if not reduced into actual or constructive possession before the coverture is dissolved by the divorce, *survive to the wife*. (1 Bl. Com. 440, n (29); *Browning v. Headley*, 2 Rob. 340.)

4<sup>a</sup>. Rights which relate to Property, but which *depend on the Continuance of the Coverture*.

Of this kind is the right of one party, who survives, to be the *distributee* of the chattels of the other, being deceased, or to be *administrator* of the deceased; and such rights as these are supposed to be defeated by the divorce.

2<sup>a</sup>. The effect, as to the Estates of the Parties, of a Divorce *a Vinculo*, accompanied by *Special Orders*.

Upon decreeing the *dissolution* of a marriage, and also upon decreeing a divorce, whether *a vinculo* or *a mensa*, the court may make such further decree as it shall deem expedient concerning the *estate and maintenance* of the parties, or either of them. (V. C. 1873, c. 105, § 12.)

Our courts, in pursuance of this statute, are accustomed to accompany not only divorces *a mensa*, as in England, but also those *a vinculo* with decrees for *alimony*, the amount of which is determined by like considerations as we have seen prevail in England. (1 Bl. Com. 441; 1 Tuck. Com. 107; Bish. Mar. & Div. § 603; *Cooke v. Cooke*, 2 Phill. (1 E. R.) 40; *Bailey v. Bailey*, 21 Grat. 56, &c.; *Carr v. Carr*, 22 Grat. 173; *Rees v. Rees*, 3 Phill. (1 E. R.) 387; *Burr v. Burr*, 7 Hill (N. Y.), 207; *Ante*, p. 273, 2<sup>o</sup>.)

5<sup>g</sup>. Doctrine touching Foreign Sentences of Divorce; W.C.1<sup>h</sup>. Doctrine in England.

The narrow and illiberal doctrine of the English courts is that marriages solemnized in England can only be dissolved (so as to make the dissolution valid *in England*, or *by English law*) in accordance *with the law of England*. Hence, if parties are *married in England*, and then *remove their domicil* to Scotland, a divorce, according to the law of Scotland, is not valid in England. In order to be valid there, the divorce must conform to the requirements of English law, which is wholly opposed to the general rule prevailing in most other civilized countries—namely, that the validity of a divorce is determined by the *lex domicilii*, the law of the parties' domicil. It is, besides, violative of international comity. (Bac. Abr. Mar. & Div. (F) 3; Stor. Conf. L. § 125, &c.; 2 Kent's Com. 116, 117.)

2<sup>h</sup>. Doctrine in Virginia as to Foreign Sentences of Divorce; W. C.1<sup>i</sup>. Doctrine in Virginia as to Foreign Divorces, pronounced *outside of the United States*.

The general doctrine of all civilized States, except England, and the doctrine strongly sanctioned by international comity, is that the validity of a divorce is regulated by the *lex domicilii*, the law of the place of the *actual bona fide domicil* of the parties. The proper courts of that place have jurisdiction to decree a divorce for any cause allowed by the local law, without reference to the law of the place of the original marriage, or of the place where the offence for which the divorce is allowed was committed. This doctrine is firmly established in the United States, and is substantially recognized in Scotland, and for the most part on the continent of Europe. (Stor. Conf. L. § 230, a; Id. 221, &c.; 2 Kent's Com. 107, &c.; V. C. 1873, c. 105, § 8; Cheever v. Wilson, 9 Wal. 124.)

The domicil of the husband must, *in general*, be treated as the domicil of the wife, but not so as to oust of their jurisdiction the courts of the State where the parties were domiciled when the right to a divorce accrued; nor so as to deprive the injured wife of the protection of its laws, and of her right thereby to a divorce. The rule upon the subject, indeed, is that she may acquire a separate domicil whenever it is *necessary or proper that she should do so*. The right, on her part, springs from the necessity for its

exercise, and endures as long as the necessity continues. The proceedings for a divorce in such cases may be instituted where the wife *has her domicil*. The place of the marriage and of the offence, and the domicil of the husband, are then of no consequence. (Cheever v. Wilson, 9 Wal. 124; 2 Bish. Mar. & Div. § 475; Barbee v. Barbee, 21 How. 582, 593.)

2<sup>d</sup>. Doctrine in Virginia as to Foreign Divorces obtained in *other States of the Union*.

By the Constitution of the United States full faith and credit are to be given in each State to the public acts, records, and *judicial proceedings* of any other State; and this, by the Supreme Court of the United States, is held to attach to the judgment of the State Court the same validity and effect in every other State in the Union, which it has in the State where it is rendered, provided the parties thereto *appear*, or be *personally* summoned, and there is no *fraud or collusion*. (Const. U. S. Art. IV, § i; Hampton v. McConnel, 3 Wheat. 234; Mayhew v. Thatcher, 6 Wheat. 129; Mills v. Duryee, 7 Cr. 484; D'Arcy v. Ketchum, 11 How. 175; Christmas v. Russell, 5 Wal 302.)

Hence, if a divorce *a vinculo* be obtained in another State, *according to the laws thereof*, the defendant being *personally summoned*, and submitting to the jurisdiction, although *neither party be domiciled there*, and after a fair investigation of the merits (that is, an investigation without fraud or collusion), the sentence, it seems, must be received as having the same validity and effect everywhere in the United States, and amongst the rest in the State of the parties' actual domicil as it had in the State where it is rendered. (2 Kent's Com. 108-'9; 1 Tuck. Com. (B. I.) 107-'8; Cheever v. Wilson, 9 Wal. 123.)

6<sup>s</sup>. Sundry Matrimonial Causes besides Divorce.

Let us see, (1), What are such matrimonial causes; and (2), The courts in which they are cognizable;  
W. C.

1<sup>h</sup>. What are such Matrimonial Causes.

The matrimonial causes, other than divorce, are (1), Suit for jactitation of marriage; (2), Suit for restitution of conjugal rights; and (3), Suit for alimony;  
W. C.

1<sup>i</sup>. Suit for *Jactitation* of Marriage.

When one party gives out or boasts (*jactitat*) that he or she is married to another, whereby a common

reputation of their marriage may ensue, it may be expedient to institute a suit, in order to inquire into the fact of the imputed marriage, upon the application of the party complaining; and if it appear that there has been no such marriage, to impose silence upon the *boaster*. Such a proceeding is called a suit for *jactitation* of marriage. Suits for jactitation of marriage, with other matrimonial causes, are submitted in England to the ecclesiastical courts, or since 1858, the Court for Divorce and Matrimonial Causes. In Virginia no tribunal was provided for the determination of jactitation suits until the revisal of 1849, when more comprehensive provisions for matrimonial causes than ever before existed were introduced into our Code. The courts charged with this class of cases are the circuit and corporation courts on the chancery side. (3 Bl. Com. 93; *Watson v. Rider*, 1 Lee, (5 E. E. R.) 16; *Wescombe v. Dods*, Id. 59; *Duchess of Kingston's case*, 20 How. St. Tri. 355; *Meadows & ux v. Duchess of Kingston*, 2 Amb. 760; V. C. 1873, c. 105, § 5, 8; Id. c. 154, § 38.)

2<sup>d</sup>. Suits for Restitution of Conjugal Rights.

Whenever either party *lives separate* from the other without sufficient reason, a suit may be instituted to compel cohabitation, if the party complaining is weak enough to desire it contrary to the inclination of the consort; and such a suit is called a suit for *restitution of conjugal rights*. But the only duty which in the nature of things is capable of being thus enforced is that of "*living together*." (3 Bl. Com. 94; Bish. Marr. & Div. § 507; *Orme v. Orme*, 2 Add. (2 E. E. R.) 382; *Molony v. Molony*. Id. 249; 1 Hagg. C. R. (4 E. E. R.) 358, 363.)

It seems the better opinion that this jurisdiction does not exist in this country, unless conferred by statute; and as we have no statute in Virginia bestowing it, it is supposed to be wanting in our system. The only relief, if any, which could be here obtained, is a decree of divorce for *desertion*. (Bish. Marr. & Div. § 279, 502, 506 & seq.)

3<sup>d</sup>. Suit for Alimony.

In England alimony, which means an allowance for the maintenance of the wife, is a *mere incident* to a decree of divorce *a mensa*, and it is generally granted, of course, by the same court, that is, the court christian, or since 1858 by the court for divorce and matrimonial causes. There are instances, indeed, of the court of chancery enforcing a previous agree-

*ment* to provide maintenance for a wife, and also of its decreeing maintenance as incidental to some other principal object within the scope of its powers; but the doctrine seems to be settled there that alimony is always an *incident only*, and that no court has any jurisdiction to give a wife a separate maintenance where it is the sole relief sought. (2 Burn's Eccles. L. 506 & seq.; Bac. Abr. Bar. & F. (H); 2 Stor. Eq. § 1422 & seq.; Ball v. Montgomery, 2 Ves. Jun. 191.)

In Virginia not only is alimony granted as incidental to divorce of *either kind*, with the largest discretion, as we have seen (*ante*, p 269, 1<sup>1</sup>), as to the estates of the parties, but it may be granted by the court of chancery, independently of any divorce, or any application for one, as where the misconduct of the husband drives the wife from her home, or he turns her out of doors, or perhaps wherever a divorce from bed and board, or a restoration of conjugal rights would be decreed. (Purcell v. Purcell, 4 H. & M. 507; Almond v. Almond, 4 Rand. 662; Spencer v. Ford, 1 Rob. 648; Bish. Mar & Div. § 555.) But no alimony will be decreed to a wife who without adequate reason deserts her husband and refuses to live with him. Whilst she thus disregards her husband's comfort and happiness, her own duty, and the decencies of society, she has no right to demand of him a support in a separate establishment, and to concede it would be a reward to misconduct, and would give a rude shock to the sanctity of the marriage contract. Nor is it an adequate cause for such desertion that the husband has behaved with too little tenderness and consideration; that he has been at times coarse, rude and petulant, when he should have been gentle, soothing and affectionate; that he has left her to bear alone burdens and trials which it should have been his highest pleasure to share and relieve; or that he has been close, exacting, and penurious, when he should have been, to the extent of his means, open-handed, liberal and generous. (Carr v. Carr, 22 Grat. 173, 175.)

The various questions connected with alimony cannot be here discussed. It must suffice to say that, as upon the marriage the husband has vested in him all the present available means of the wife, together with the right to claim her future earnings and acquisitions, so the law casts upon him the duty suitably to maintain her according to his ability and condition, a duty which he cannot renounce; so that



when the law in any case judges that the parties may be separated for her protection, or that otherwise the intervention of the court is requisite in consequence of *his wrong-doing*, it must also judge that he shall maintain her while such a state of things continues. It may be added, also, that in cases of divorce it is common to distinguish between the *temporary alimony*, granted during the continuance of the suit, and the *permanent alimony*, allowed at its close, the latter being in amount always greater than the former. (Bish. Mar. & Div. § 560, & seq., 613, 616.)

The *amount* of alimony to be allowed is matter of discretion with the court, not, however, an arbitrary, but a judicial discretion, to be exercised according to established principles, and upon a view of all the the circumstances of the case. The general rule, especially in respect to permanent alimony, is that the wife is entitled to a support corresponding to her husband's condition in life, and his fortune and resources, including his and her earnings, or ability to earn money. Ordinarily, it is said, the wife ought to be allowed, for *temporary* alimony, about *one-fifth* of the joint income, as just defined, and for *permanent* alimony, from one-half to one-third, two-fifths being no uncommon proportion. (Bish. Mar. & Div. 603, & seq.; Id. 614, & seq., 616, & seq.; Bailey v. Bailey, 21 Grat. 52, & seq.; see Carr v. Carr, 22 Grat. 168.)

2<sup>d</sup>. The Courts in which these several Matrimonial Causes are cognizable; W. C.

1<sup>st</sup>. The Courts of England.

They are in general, at common law, the *ecclesiastical courts*, except, perhaps, that in a few cases of previous agreement, or as incident to other equitable relief, alimony is decreed by the court of chancery. But since 1858, by Statute 20 & 21 Vict., c. 85, amended by certain subsequent statutes, matrimonial causes have been transferred to a new court, called "The Court for Divorce and Matrimonial Causes," which may exercise, in respect to alimony, even a larger jurisdiction than belonged, at common law, to the ecclesiastical courts. (Wms. Pers. Prop. 360.)

2<sup>d</sup>. The Courts in Virginia.

They are the *Circuit and Corporation courts*, on the chancery side. These courts have jurisdiction "of suits for annulling or affirming marriages, whose validity is denied or doubted, or for divorces," with



ample incidental powers to provide for the maintenance and security of the wife, the custody of minor children, and the disposition of the estate of the parties. Hence, it seems that these courts may not only exercise authority as to which there can be no doubt, but may also intervene to determine any question as to the validity of marriage, raised either by denying or affirming it, but it is believed not to *compel the parties to cohabit*. (V. C. 1878, c. 104, s. 2, 4, 5, 10, 12, 13; *Purcell v. Purcell*, 4 H. & N. 505; *Almond v. Almond*, 4 Rand. 442; *supra* p. 282-3.)

#### 4. The Legal Consequences of Marriage.

In order to determine the legal consequences of marriage, we may advert to (1), The effect of marriage as between husband and wife themselves; (2), The effect of marriage as to third persons; and (3), Contrast of the sexes in respect to their several rights and privileges:

W. C.

##### 1. Effect of Marriage as between Husband and Wife themselves.

The effect of the marriage as between husband and wife themselves relates to the effect (1), In respect to the *persons* of husband and wife; and (2), In respect to the *property* of the parties;

W. C.

##### 1<sup>a</sup>. Effect of Marriage in respect to the persons of Husband and Wife.

By marriage, husband and wife become *one person* in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband. Upon this union of person, as has been before observed, depends almost all the legal rights, duties and disabilities which belong to either by reason of the marriage. (1 Bl. Com. 442.)

Let us consider (1), The duties of husband to wife; (2), The duties of wife to husband; and (3), The doctrine as to deeds of separation;

W. C.

##### 1<sup>b</sup>. Duties of Husband to Wife.

Independently of his obligation to pay her antenuptial debts, to maintain her, and to answer for her torts (which refer themselves rather to the next head, of *property*), the husband's duties are summarily expressed in the vow he makes in marriage—namely, to “love her, comfort her, honor, and keep her, in sickness and in health, and, forsaking all others, to keep

only unto her as long as they both shall live." The law cannot, indeed, in the nature of things, enforce the observance of these duties, save in a very imperfect manner; but it recognizes them as duties, and gives no countenance to the doctrine that they may be evaded at the pleasure of either or both of the parties. They cannot, as Sir Wm. Scott observes, by private contract dissolve the solemn tie which binds them, and throw themselves upon society in the undefined and dangerous character of a wife without a husband, and a husband without a wife. (*Evans v. Evans*, 1 Hagg. C. R. (4 E. E. R.) 35, 120.)

It is the husband's duty, as the stronger party, to practise the greater forbearance, and to persevere in employing it, despite turbulence of temper, petulance of manners, and infirmity of body or mind. "Where they occur," says that great judge, "their effects are to be subdued by management, if possible, or submitted to with patience, for the engagement was to take *for better, for worse*; and painful as the performance of this duty may be, painful as it certainly is in many instances, which exhibit a great deal of the misery which clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance." (*Evans v. Evans*, 1 Hagg. C. R. (4 E. E. R.) 35, 120.) And so a greater than Sir Wm. Scott enjoins: "Husbands, love your wives, *and be not bitter against them*." (Coloss. iii. 19.)

## 2<sup>h</sup>. Duties of Wife to Husband; W. C.

### 1<sup>l</sup>. What are the Duties owing by Wife to Husband.

The wife's duties to the husband are also fairly expounded in *her* marriage vow, namely to "obey him and serve him, love, honor, and keep him, in sickness and in health; and forsaking all others, to keep only unto him, so long as they both shall live." And directly to the same effect is the divine precept, "Wives, submit yourselves unto your own husbands, as it is fit in the Lord." (Coloss. iii. 18.)

### 2<sup>l</sup>. The Husband's Power of Correction.

Modern refinement affects to be shocked at the power given by the common law to the husband over the wife, and certainly the ungentle exercise of his authority may well excite, as it does, the strongest indignation of society. But when it is considered that the husband is liable in damages for all his wife's *torts*, whether of tongue or hand, and can in no way escape from such responsibility, however lit-

tle he may sympathize with, or even though he be ever so much opposed to the wrong, it is not unreasonable to commit to him a large latitude of control and restraint, especially as public opinion, and even the guardians of the law are ever watchful to prevent his transgressing the limits assigned him. The best common law authorities affirm that "the husband hath by law power and dominion over his wife, and may keep her *by force* within the bounds of duty, and may beat her, but not in a violent or cruel manner; for in such case, or if he but *threaten* to beat her outrageously, or use her barbarously, she may bind him to the peace, or may obtain a divorce, *propter sævitiam*." It must be owned, however, that it is the part of practical wisdom for English and Virginian husbands to forbear the exercise of this portion of their marital authority. (1 Bl. Com. 445-'6; Bac. Abr. Bar. & F. (C); Bish. Marr. & Div. § 485, &c.)

#### 8<sup>b</sup>. Doctrine touching Deeds of Separation of Husband and Wife.

The discussion of the doctrine touching deeds of separation will include the explanation of (1), The nature of deeds of separation; (2), The validity of deeds of separation; (3), The effect on deeds of separation of renewed cohabitation; (4), The effect of deeds of separation as to the custody of the children; (5), The effect of deeds of separation as to the adultery of either consort;

W. C.

##### 1<sup>a</sup>. The Nature of such Deeds of Separation.

Deeds of separation are deeds whereby it is covenanted between the husband and wife, or more properly between the husband, on the one side, and a *trustee for the wife*, on the other, that the husband shall on his part provide a stipulated competency for the wife, and that the trustee shall on his part indemnify the husband against all debts which she may contract during the contemplated separation: that the husband and wife shall live separately, and that neither will exact or sue for a restitution of conjugal rights.

For the most part, they contemplate a *present separation*, upon the ground of existing dissensions: but sometimes parties are so extremely provident as to make arrangements by means of such deeds for *future separations*. 2 Bight H. & W. 316: 1 Tuck. Con. R. P. 105-6.

2<sup>d</sup>. The Validity of *Deeds of Separation*, and the Enforcement thereof.

Many cases occur in the English books founded upon the idea that, by the mutual consent of the parties, expressed in deeds of separation, the coverture may, for many purposes, be dissolved, especially in respect to the obligation to cohabit, the personal incapacities of the wife, and the authority vested by the marriage in the husband; and that whether the covenants contained in the deed were between the husband and wife alone, or between the husband and a trustee for the wife. Thus these cases, as far as their authority extends, would, singularly enough, permit this most important relation—of which the common law is so tender that when legally contracted it esteems it indissoluble, even in the discretion of the most reverend judges, for any supervenient cause whatsoever,—to be virtually terminated as to its most essential incidents by the mere private consent of the parties themselves; and not only by a consent given *in presenti*, in view of existing dissatisfactions, but also by a consent given *in advance*; a consent to put asunder, upon some stipulated contingency, those whom God hath joined! (Moore v. Moore, 1 Atk. 277; Lister's case, 1 Stra. 478; Mead's case, 1 Burr. 542; Vane's case, 13 East. 171, note.)

This doctrine, which the ecclesiastical courts have persistently combated, has more recently been so limited as to be shorn of its most pernicious consequences. Thus the covenant is admitted to be wholly without legal effect if it be between the husband and wife *alone*, she having no capacity to contract with anybody, and above all not with him. Then, although the agreement be between the husband and a *trustee*, it does not restore to the wife any of the capacities of which coverture deprived her; nor does it bar a suit for the restitution of conjugal rights, nor deprive the husband of his marital control of the wife's person, if, notwithstanding the covenant to the contrary, he chooses to exert it, although doubtless an action on the covenant would lie for the trustee against the husband for any breach of its stipulations. Covenants for *future separation*, at the pleasure of either party, are by these later cases held *to be void*, as of evil tendency, although, unhappily, it seems that such covenants may be supported if the future separation is to receive the *sanction of the trustees*. And in short, deeds of separation, even

*in present*, are now regarded as valid only in respect to the *property arrangements* which they contemplate, and annul or impair no other of the marital rights and obligations than such as relate to *property*; and it is as to property arrangements alone that such deeds are specifically enforced in equity: and that as to the husband only, who, being *suus juris*, may enter into such engagements as he shall see fit: but not as to the wife, who, as we have seen, loses none of her conjugal incapacities in consequence of any actual or projected separation, unless, indeed, in respect to her *separate estate*, as to which she may sometimes contract as if she were a *feme sole*. (2 Stor. Eq. § 142; 1 Bish. Marr. & Div. § 656; Marshall v. Button, 5 T. R. 545; Legard v. Johnson, 3 Ves. Jun'r, 352; St. John v. St. John, 11 Ves. 526; Worrail v. Jacob, Meriv. 255, 265; Durant v. Titley, 7 Price, (3 Eng. Exch.) 577; Hindley v. Westmeath, 6 B. & Cr. (13 E. C. L.) 200; Cocksedge v. Cocksedge, 14 Sim. (37 Eng. Chan.) 244; Rodney v. Chambers, 2 East. 283; Jee v. Thurlow, 2 B. & Cr. (9 E. C. L.) 551; Walker v. Walker, 9 Wal. 750, &c.; Switzer v. Switzer, 26 Grat. 578 & seq.)

An agreement for a separation can in no case be sustained unless it clearly appear that in the negotiation which preceded it, as well as at the time of executing it, the wife was in a position to act, and did act, not only with perfect freedom, but with a full knowledge and appreciation of all the circumstances of her situation, and of her individual and marital rights; and the contract itself must be fair and just, wholly free from exception, and such as a court of equity might have imposed upon the parties, had the case fallen under its jurisdiction. (Switzer v. Switzer, 26 Grat. 582.)

#### 81. Effect on Deeds of Separation of *Renewed Cohabitation*.

The effect of renewed cohabitation, whether it arise from voluntary reconciliation, or from the coercion of the court, is for the most part to put an end to the stipulations of the deed of separation, the *status* contemplated by it no longer existing, although whatever permanent provisions touching property may be contained therein, which do not depend exclusively upon a separation, will of course continue valid, and may be enforced, especially where third persons are interested in them. (2 Bright's H. & Wife, 319-'20; Fletcher v. Fletcher, 2 Cox, 105;

Worrall v. Jacob, 3 Meriv. 268; Walker v. Walker, 9 Wal. 752.)

4<sup>1</sup>. Effect of Deeds of Separation *as to the Custody of the Children.*

It seems that the father, to whose charge the law primarily assigns the custody and care of the minor children, cannot transfer his responsibility and duty to another, not even to the mother; and that a stipulation to do so will in general be void as against public policy. (St. John v. St. John, 11 Ves. 538; Villa Real v. Mellish, 2 Swanst. 537-'8.)

5<sup>1</sup>. Effect of Deeds of Separation *in respect to the Adultery of either Consort.*

The ordinary provisions of deeds of separation stipulate that the parties, and especially the wife, may live where and with whom they may severally think fit; but this is not to be construed as signifying the consent of either consort that the other may live in adultery, and if either be guilty of it, the aggrieved party may demand a divorce, just as if the deed of separation had never existed. (2 Bright's H. & W. 317-'18.)

2<sup>2</sup>. Effect of the Marriage in respect to the *Property of the Parties.*

The effect of marriage in respect to the property of the parties, respectively, is to be considered, (1), With regard to *contracts* and other transactions occurring between husband and wife *before marriage*; (2), With regard to contracts and other transactions between husband and wife occurring *during coverture*; and (3), With regard to the *property of each consort*, in respect to the other;

W. C.

1<sup>1</sup>. Effect of Marriage with regard to *Contracts* and other transactions between Husband and Wife *occurring before Marriage*; W. C.

1<sup>1</sup>. The General Doctrine.

If a man and a woman enter into any contract together, whether to pay money or to do a collateral thing, and afterwards intermarry, the contract is in general thereby discharged; because the existence of the wife is then merged in that of her husband, and they are in law, for most purposes, *one and the same person*. Hence, if two men enter jointly into a contract with a woman, and one of them afterwards marries her, the contract is discharged as to the husband, and consequently as to the other also, since it can only be enforced as it was made,—that

is, *jointly*; and as by the marriage the husband is released, it is no longer enforceable against the other contractor. (1 Bl. Com. 442, n (40); 1 Bright's H. & Wife, 18; Bac. Abr. Bar. & F. (E).) And this doctrine is understood to be in no wise impaired by the statute (V. C. 1873, c. 141, § 14, 15) allowing a creditor to *compound or compromise* with a joint contractor or co-obligor, and to release him from liability without impairing the contract or obligation as to the other joint parties, that provision appearing clearly to refer to *express* releases, and not to those arising by construction of law. (See V. C. 1873, c. 143, § 5.)

2<sup>l</sup>. Exceptions to the General Doctrine;  
W. C.

1<sup>k</sup>. Contracts to be performed *after the Coverture is determined*.

If a bond binds not the obligor himself, but *his executors*, to pay money to a woman whom he afterwards marries, the marriage does not impair the force of the bond. And so, in short, all contracts, which by their stipulations are not to be performed until the coverture is terminated, are valid and obligatory, notwithstanding the subsequent intermarriage of the parties. (1 Bl. Com. 442, n (40); 1 Bright's H. & Wife, 19, 20; Bac. Abr. Bar. & F. (E); Cage v. Acton, 1 Ld. Raym. 515; Milbourn v. Ewart & als, 5 T. R. 384.)

2<sup>k</sup>. Contracts made *in contemplation of Coverture*.

Contracts to settle money or property upon the consort, or any other arrangements of like nature, made *in contemplation of and with a view to marriage*, although they are discharged *at law* by the subsequent marriage, yet are sustained and enforced *in equity*, according to the intent of the parties and the justice of the case, which equity will not permit to be defeated by the technical assumption of the unity of husband and wife. (1 Bl. Com. 442, n (4); 1 Bright's H. & Wife, 19; 2 Stor. Eq. § 1370-'71; Bac. Abr. Bar. & F. (E); Cannel v. Buckle, 2 P. Wms. 243; Watkyns v. Watkyns, 2 Atk. 97; Acton v. Pierce, 2 Vern. 480, & Cases, n (1).)

3<sup>k</sup>. Contracts made by one or both of the Parties *in a representative character*; e. g., as *Executor, &c.*

Contracts between a man and a woman, made *in auter droit* by either, as, for example, as *executor, &c.*, are not discharged, even at law, by the subsequent intermarriage of the parties. Such a con-



struction would work a *devastavit*, or wasting of the estate committed to the executor, &c., contrary to the maxim that the law, by its implications, never works a wrong, *actus legis nemini facit injuriam*. (1 Bright's H. & Wife, 21, & seq.; Broom's Max. 89; Needham's Case, 8 Co. 136, a; Waukford v. Waukford, 1 Salk. 306.)

4<sup>k</sup>. Contracts made before Marriage by one Consort *with a trustee* for the other.

The promise in this case being made, not to the consort, but to the *trustee*, in whom consequently the *legal title* to the benefit of the contract vests, the technical reason for the discharge operated in other instances by the subsequent marriage ceases, and the contract, notwithstanding such marriage, is good even at law; but it has been suggested, with reason, that it will be invalidated in equity when not executed *in contemplation* of marriage. And if, at common law, a contract with the consort's trustee, not in contemplation of marriage, would thus be invalidated in equity, a similar conclusion must, *a fortiori*, prevail in Virginia, where a promise or covenant *for the benefit of another* is suable even in a court of law in the beneficiary's own name. (1 Bright's H. & Wife, 21; V. C. 1873, c. 112, § 2.)

2<sup>h</sup>. Effect of Marriage with regard to *Contracts* and other transactions between Husband and Wife *occurring during coverture*.

The transactions which may thus occur between husband and wife during coverture may be classed under the heads of (1), Conveyances by husband to wife, and *vice versa*; (2), Executory contracts as between husband and wife *during coverture*; (3), Testamentary dispositions by either consort in favor of the other; and (4), Marriage settlements;

W. C.

1<sup>i</sup>. Conveyances *by Husband to Wife*, and *vice versa*.

Conveyances by the husband to the wife are usually and most appropriately made to *trustees* in trust for the consort, and in that form such transactions have been familiar ever since the introduction of uses and trusts in the latter part of the reign of Edward III (about A. D. 1370). But for consideration more than a century past, the courts of equity have maintained conveyances *directly* from the husband to the wife, without the intervention of any trustee. What is to be said on this topic, there-



fore, may be referred to the two heads just indicated—namely, (1), Conveyances by husband to trustee for wife, and *vice versa*; and (2), Conveyances by husband directly to the wife, and *vice versa*;

1<sup>k</sup>. Conveyances *by Husband to Trustee for Wife, and vice versa.*

Conveyances by the husband to a trustee for the wife have been freely admitted, as above observed, from the first introduction of trusts, with no other proviso than that creditors of the grantor, and subsequent purchases for value and without notice, shall not be thereby prejudiced. The *legal title* being by such conveyance vested in the trustee, any suit touching the property must, in a *court of law*, be in the trustee's name; but as the *equitable title* is in the consort as *cestui que trust*, or beneficiary, his or her rights, if invaded, may be asserted in a court of equity, even as against the other consort. If it be the wife who in such case has occasion to ask the aid of the court, she sues under the protection of her *prochein ami*, or next friend, who is usually her husband, unless his interest is adverse to hers, and in that case it may be any one whom the court shall approve, who may be willing to act in that capacity. (1 Th. Co. Lit. 130; 2 Stor. Eq. § 1380; 3 Rob. Pr. (2d. ed.) 229-'30.)

When the wife proposes to convey her maiden lands to her husband, the object cannot well be accomplished, nor probably accomplished at all, except by the husband and wife uniting, in pursuance of the statute (V. C. 1873, c. 17, § 4, 7), in a conveyance of it to a third person (who is virtually a trustee, whether declared to be so or not), who conveys it to the husband, in whom is thus vested a complete title, indefeasible in equity as well as at law. (Shepperson v. Shepperson, 2 Grat. 501; McCartee v. Orphan Asylum, 9 Cow. (N. Y. 437). But if, in the arrangement between the husband and wife, which is consummated by the conveyance, there be any material inequality, any gross inadequacy of consideration, where a consideration was contemplated, or any fraud, oppression, or unfair advantage as respects the wife, the deed with the privy examination does not impart in a court of equity any additional validity to the transaction. Indeed, as the union of husband and wife as grantor is necessary to make a conveyance operative under

the statute, it is manifest that the husband cannot himself be the grantee therein, either directly, or through the medium of an express trust. (Switzer v. Switzer, 26 Grat. 582-'3.)

These conveyances ought always to be registered according to the statute of registry (V. C. 1873, c. 114, § 6). The claims of subsequent purchasers are thereby in all cases precluded, the registry being constructive notice to them; and so also are those of creditors, provided the conveyance is founded on a *valuable consideration*, and is not tainted with any collusion between husband and wife to defraud creditors. When made in pursuance of an *ante-nuptial* contract the marriage is a valuable consideration; and so also, though there be no ante-nuptial agreement, is the relinquishment of the wife's contingent claim of dower, or of her equitable *choses in action*; and so, of course, is any *directly* valuable consideration which the wife herself or her friends can furnish. (2 Lom. Dig. 434 & seq.; 2 Insts. Com. & Stat. Law, 691 & seq.; Cronie v. Hart & als, 18 Grat. 744; V. C. 1873, c. 114, § 1, 2, 6.)

2\*. Conveyance *by Husband directly to Wife, and vice versa.*

It is the established doctrine of the common law, as administered *in the courts of law*, that a man can grant nothing to his wife, nor she to him, nor can they enter into any contract, the one with the other; for the grant would be to suppose her separate existence, and the contract with her would be only a contract with himself. (1 Bl. Com. 442; 2 Bright's H. & Wife, 29; 1 Th. Co. Lit. 130-'31.) A remarkable qualification of this general doctrine is mentioned by Coke, (2 Th. Co. Lit. 531.) If a feme disseisor, says he, make a feoffment to A for life, remainder to herself in tail, remainder to B in fee, and then taketh husband the disseisee, and he releaseth to A *all his right*, this shall enure to B, and *to his own wife* also; for by the rule of Littleton it must enure to all in the remainder. In truth, according to Hawkins, it enures by way of *extinguishment* of the husband's right, without passing it to the wife, so that she takes *by construction of law*. (Hawk. Abr. 394.)

Whilst the rule of the common law, as expounded in the *law courts*, is thus rigorous, it is possible, by means of a conveyance, operating under the *Statute*

of Uses (27 Hen. VIII, c. 10 ; V. C. 1873, c. 112, § 14) for a husband to transfer land directly to his wife, although here also it is *by construction of law*. Thus if a husband covenant with a *third person*, in consideration of *love and affection* for his wife, to stand seised of certain land *to her use*, the statute of uses will transfer the *possession* from him to her. And so upon principle, it would seem, it ought to be if the husband should bargain with a *third person*, for *valuable consideration*, to stand seised to his wife's use. (1 Th. Co. Lit. 130, 132, n (9); 2 Lom. Dig. 24—'5.)

The courts of equity, for more than a century, as before remarked, have discarded the *necessity* for trustees, (however they may allow the convenience) in conveyances from husband to wife, and have supported them when made *directly* by him to her, wherever they do no wrong to his creditors, or to subsequent purchasers from him for value and without notice; but with this qualification, that he shall not, in an excess of uxoriousness, deprive himself of the whole, nor even of an unreasonable proportion of his estate (she being entitled only to a provision out of the same), unless, indeed, in case of some strongly *meritorious consideration* apart from the mere conjugal relation. The settlement of the husband's *whole estate* may under such peculiar circumstances be sustained in equity. (1 Bright's H. & Wife, 33; 2 Stor. Eq., § 1374 & seq.; Beard v. Beard, 3 Atk. 72; Shepard v. Shepard, 2 Johns. C. R. 57; Jones v. Obenchain, 10 Grat. 259.)

Equity, in conveyances of this kind, made *directly* from husband to wife, regards the husband as in fact the wife's *trustee*, and whilst the transaction is void *at law*, maintains the wife's rights as effectually as if a third person trustee had been interposed. The evidence, however, must be clear and satisfactory, not only that the husband designed to bestow the property upon her, but that he divested himself of it, and distinctly agreed to hold it as trustee for the wife. (McLean v. Longlands, 5 Ves. 79; Walter v. Hodge, 2 Swanst. 106—'7; *post* p. ; 2 Stor. Eq. § 1380; Lucas v. Lucas, 1 Atk. 271; Bletson v. Sawyer, 1 Vern. 244; Slanning v. Style, 3 P. Wms. 338; Jones v. Obenchain, 10 Grat. 259).

The most prominent instances where equity has applied the doctrine under consideration, by giving

effect to gifts from husband to wife, without the intervention of a trustee, are—

(1). Conveyances direct from him to her, of lands, stocks, money, &c., as illustrated by the cases of *Lucas v. Lucas*, 1 Atk. 271; *Walter v. Hodge*, 2 Swanst. 104 & seq; case of *Countess Cowper*, 3 Atk. 393; *McLean v. Longlands*, 5 Ves. 71; *Rich v. Corkell*, 9 Ves. 375; *Jones v. Obenchain*, 10 Grat. 259; 2 Stor. Eq. § 1374-'5; and

(2). Gifts of *savings of pin-money*, or of house-keeping allowance, of trinkets, &c., as illustrated by *Slanning v. Style*, 3 P. Wms. 338; *Countess Cowper's case*, cited *Graham v. Londonderry*, 3 Atk. 393; 2 Stor. Eq. § 1375.

2<sup>1</sup>. Executory Contracts, as between Husband and Wife, *during Coverture*; W. C.

1<sup>k</sup>. Doctrine in *Courts of Law*.

Contracts executory between husband and wife, made *during coverture*, are *at law* always nullities, there being a positive incapacity in each to contract with the other. (1 Th. Co. Lit. 130; 2 Stor. Eq. § 1372.)

2<sup>k</sup>. Doctrine in *Equity*.

In courts of equity, executory contracts between husband and wife, made *during coverture*, are in a few instances enforced, but only, it is believed, when they relate to her *separate estate*; as for example, where she, in good faith, and for a reasonable consideration, agrees to make him, out of her separate property a certain allowance; or he agrees to repay money lent by her out of her separate estate; or that she shall separately enjoy property bequeathed to her; or where he agrees to settle property on her in consideration of her relinquishment of her dower-interest in his lands, &c. (2 Stor. Eq. § 1372-'3.)

3<sup>1</sup>. Testamentary Disposition *by either consort in favor of the other*.

Testamentary dispositions, as they do not take effect until after the coverture is terminated by death, are allowed without qualification on the part of the husband (saving the rights of creditors), and on the part of the wife also, as to her *separate estate*, or by virtue of a *power of appointment*. Upon this principle a *donatio mortis causa* is valid as between husband and wife. (1 Bl. Com. 442, & n (41); 2 Kent's Com 129; *West v. West's Ex'ors*, 3 Rand. 363; V. C. 1873, c. 118, § 3.)

4<sup>1</sup> Marriage Settlements.

Actual marriage settlements, made before coverture, commonly employ the intervention of *trustees*, but whether there be trustees or not, or whether it be an actual settlement or merely an antenuptial contract for one, the rights of the wife under it are enforced and protected in a Court of Equity; but not so as to divest the husband's marital rights to a greater extent than the terms of the instrument *clearly require*. Nay, although there be no *antenuptial* agreement, yet if there be a valuable consideration, and if the claims of creditors, and of subsequent purchasers for value and without notice, do not stand in the way, such a settlement is still valid. (2 Kent's Com. 172 & seq; *ante* p. 292, 1<sup>k</sup>.; Woodson v. Perkins, 5 Grat. 345; Mitchell v. Moore & als, 16 Grat. 275; Gosden & ux v. Tucker's Heirs, 6 Munf. 1; 1 Tuck. Com. 111, B. I; Buck & als v. Wroten & ux, 24 Grat. 250.) Hence if a married woman relinquishes her claim for dower on the faith of a settlement of other property made, or *agreed to be* made by her husband, such settlement will be held good, to the extent of a just compensation for the interest so relinquished. (Burwell's ex'or v. Lumsden, 24 Grat. 443.)

Marriage settlements, like all other conveyances of property, ought to be as accurate and definite as possible in describing the property, so that it may be clearly identified and distinguished. Such specification is particularly needful in respect to personal chattels, although it is not yet determined how minute the specification must be. Perhaps all that at present can be said in respect to the want of a specification is that it is a *circumstance of suspicion*. (1 Tuck. Com. 111-'12, B. I; Eckhols v. Graham, 4 Call, 494; Galt & al v. Carter, 6 Munf. 249-'50; Jarman v. Woollaton & al, 3 T. R. 621-'2; Haselinton v. Gill, Id. 620, n (a); Cadogan v. Kennett, Cowp. 432; Lady Arundell v. Phipps & al, 10 Ves. 139, 150.) But the registry of such a deed, thus wanting in the designation and description of the property, conveys no notice, in point of law, to a subsequent purchaser of the existence of the instrument; nor would he be affected by actual notice of its existence, unless he had also notice of the property embraced in it. (Mundy v. Vawter & als, 3 Grat. 545.)

If the settlement, or agreement for a settlement, be made after marriage, without the intervention of a trustee, between the husband and wife alone, it is

valid, so it be not to the prejudice of creditors, and supposing it to be *under seal*, so as not to be *nudum pactum* at law, it will be decreed in equity to be carried into effect, although there be no valuable consideration therefor (for marriage already contracted without reference to a settlement cannot be a consideration), for the existing *relation of husband and wife* constitutes a *meritorious cause* sufficient to call forth the powers and justify the intervention of a court of chancery, being one of the very few cases where a consideration *merely good*, and not valuable, is of any avail whatever. Even had the transaction, instead of an *executory contract*, been an *executed conveyance*, with no trustee interposed, it is only as an *executory trust* that a court of chancery could give effect to it, and charge the husband as trustee. (2 Stor. Eq. § 973, 987; Coleman v. Sarrel, 1 Ves. Jun. 54-'5; Ellison v. Ellison, 6 Ves. 656; 1 Wh. & Tud. L. C. 193, 216, & seq.; Pulvertoft v. Pulvertoft, 18 Ves. 84, 98-'9; Ellis v. Nimmo, Lloyd v. Goold (10 E. Ch.) 333; Shepard v. Shepard, 7 Johns. Ch. R. 57; Jones v. Obenchain, 10 Grat. 262, & seq.) The cases of Holloway v. Headington, 8 Sim. (11 Eng. Ch.) 324; Dillon v. Coppin, 4 My. & Cr. (18 E. Ch.) 647; Jefferys v. Jefferys, 1 Cr. & Phil. Id. 138, which are often cited (1 W. & Tud. L. C. 203, & seq.) as holding that equity will not enforce nor give effect to any imperfect gift founded merely on a *meritorious* consideration, though in favor of a wife, are satisfactorily explained as not warranting that doctrine. (1 Wh. & Tud. L. C. 217-'18; Jones v. Obenchain, 10 Grat. 264.)

Where the settlement is made, however, in contemplation of a separation, a court of equity declines to enforce it as being adverse to public policy, and moreover being without mutuality, the wife having no capacity to contract. But if there be a third person interposed, with whom mutually binding stipulations can be made, the fact that the same deed provides for a separation will not vitiate the property-part of the transaction, although so much as relates to the separation will be of no effect. (2 Kent's Com. 176; *ante*, 287-'8 2<sup>1</sup>.)

### 3<sup>d</sup>. Effect of Marriage on the Property of each Consort in regard to the other.

Let us advert to (1), The wife's ante-nuptial conveyances, &c., in fraud of the husband's marital

rights; and (2), The interest conferred by marriage upon either consort in the property of the other;

W. C.

1<sup>1</sup>. The Wife's ante-nuptial conveyances, &c., *in fraud of the Husband's marital rights.*

As the law imposes upon the husband the obligation of supporting the wife during coverture, and of being answerable during that period for her ante-nuptial contracts and torts, and for her post-nuptial torts, it would seem in some cases, even after the determination of the coverture; and as she is, moreover, entitled to dower in his lands if she survives him, besides a liberal proportion of the surplus of his personalty after the payment of his debts, so he is, in fairness, entitled to expect that she will not seek to deprive him of that marital interest in her property which the law accords to him. Hence, if just previous to the marriage, and in anticipation of it, she makes a *voluntary* conveyance (that is, a *gift*), of what belongs to her to some one else, without his knowledge or consent, it is deemed a fraud upon his rights, and therefore voidable by him. But a conveyance executed by the woman *prior to the treaty* of marriage (which was very suddenly consummated), although but a little while before the marriage took place, was held to be good, and much more one which, whilst it was executed only a few days anterior to the marriage, yet was designed to *secure a debt* due to a daughter by a former marriage. (Strathmore v. Bowes, 1 Ves. Jr. 23; Waller v. Armistead's Adm'r, 2 Leigh, 14; Fletcher & ux v. Ashby & als, 6 Grat. 332; Gregory & al v. Winston's Adm'r, 23 Grat. 102.) Indeed, the equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. And, in general, the existence of a valuable consideration accruing to the woman repels the idea of fraud as respects the husband, even though she particularly desired that the transaction might be concealed from him. (Blanchet v. Foster, 2 Ves. Sen'r, 264; Crump & als v. Dudley, 3 Call. 439; Gregory & al. v. Winston's Adm'r, 23 Grat. 122; England v. Downs, 2 Beav. (17 Eng. Ch.) 528; 1 Wh. & Tud. L. C. 311 & seq.)

As to what is *sufficient evidence* of fraud in such



cases, the authorities are far from uniform. (See 1 Wh. & Tud. L. C. 312 & seq.)

2<sup>1</sup>. Interest conferred by Marriage upon the Husband and Wife, respectively, *in the property of each other*; W. C.

1<sup>k</sup>. Husband's interest *in the Wife's property*.

Let us consider under this head—(1), Husband's interest in the *wife's chattels*; and (2), His interest in her *freehold lands*;

1<sup>1</sup>. Husband's interest in the *Wife's chattels*.

The wife's chattels, with respect to which the husband's marital rights are to be discussed, consist of—(1), Chattels personal in possession; (2), Chattels real; (3), *Choses in action*; and (4), *Reversionary property* in chattels—that is, personal property to be *enjoyed at a future time*;

W. C.

1<sup>m</sup>. Husband's interest in the Wife's *Chattels personal in possession*;

W. C.

1<sup>n</sup>. The General Doctrine.

All the personal estate in the possession of the wife, *in her own right* at the time of the marriage, such as money, goods, cattle, household furniture, &c., and even such tangible property (not *choses in action*) as she has not in her *actual possession*, yet if she has a good title thereto, by the marriage becomes, to all intents and purposes, the absolute property of the husband, which he may dispose of at pleasure; and if he does not dispose of it, it passes at his death, not to her, but to his personal representative. (2 Bl. Com. 433; Bac. Abr. Bar & F. (C) 3; 3 Th. Co. Lit. 309, & n (O); 2 Kent's Com. 143; *Faulkner v. Faulkner's Ex'ors*, 3 Leigh, 255; *Pratt v. Taliaferro*, 3 Leigh, 419; *Guerrant v. Hocker*, 7 Leigh, 366; *Taylor v. Yarbrough & ux*, 13 Grat. 183, 190; *White v. White & als*, 16 Grat. 264.) A *negotiable security* (that is, a bill of exchange or negotiable note in such a condition as to *pass by mere delivery*) which belongs to the wife at the date of the marriage, is looked upon, according to what seems to be the better opinion, as a *chattel in possession*, and therefore vests absolutely in the husband; and this appears to be true, although the security be payable to the wife's order, and be not endorsed by her. (Bac. Abr.



Bar. & F. (K); *McNeilage v. Holloway*, 1 B. & Ald (4\* E. C. L.) 221.) This absolute transfer of the wife's chattels to the husband by the marriage is not always viewed with a favorable eye, when, after his death, a conflict arises between the surviving wife on one side, and the husband's personal representative on the other. Thus, where a legacy was left to a wife of a chattel already in possession of herself and her husband, by loan from the testator in his lifetime, it was held that, in the absence of any proof of the assent of the executor to the legacy (whereby it would have vested in the wife, and become the property of the husband), there ought to be no presumption of such assent merely from the fact that the executor allowed the chattel to remain in the possession of the loanee during a short interval between the death of the testator and that of the husband. (*Livesay v. Helms & als*, 14 Grat. 443; *Wallace v. Taliaferro*, 4 Call. 447; *Gregory's Adm'r v. Mark's Adm'r*, 1 Rand. 355; *Taylor & als v. Yarbrough & ux*, 13 Grat. 193.)

It follows, from the foregoing view of the husband's rights in respect to the wife's chattels personal in possession, that if one detain the goods of a *feme covert* which came to his hands before the marriage (and *a fortiori* if they come into his possession after the marriage was contracted), the husband must sue alone to recover them, because the law has vested the *whole property* therein in him. (Bac. Abr. Detinue (A); 1 Chit. Pl. 84; *Draper v. Fulkes*, Yelv. 166. But *contra* 1 Tuck. Com. 329, B. II; *Taylor & als. v. Yarbrough & ux*, 13 Grat. 191.) Where, however, the suit is brought *not to recover the property*, but *for the injury* done by the trespass on it, or the conversion thereof, the action ought to be in the name of *both husband and wife*, if the conversion as well as the taking was prior to the marriage; whilst if the taking was before the marriage, and the conversion or other consummation of the wrong afterwards, the husband may, at his election, either sue alone or may join his wife. (1 Chit. Pl. 84; *Wilbraham v. Snow*, 2 Saund. 47, i.)

And it should be observed, that wherever the husband *must* sue alone (as to recover the chat-

tel), his marital right is not terminated by the determination of the coverture. (1 Chit Pl. 83; Bac. Abr. Detinue (A); Nelthorp & ux v. Anderson, 1 Salk. 114; Arundel v. Short & ux. 1 Cro. (Eliz.) 133.)

Where land is directed to be sold, and the proceeds given to a married woman, she takes it as *personalty*, which passes to her husband *jure mariti*; and, being absolutely his, he may take it, and dispose of it, if he is so minded, without actually changing its character as land; nor would it be otherwise if there were reserved to the wife the option to take the property as land, if she never exercised her election. (Prat v. Taliaferro, 3 Leigh, 419; Siter & als v. McClenachan & als, 2 Grat. 280; Haxall's Ex'ors v. Shippen & ux, 10 Leigh, 536; Lewis v. Caperton's Ex'or, 8 Grat. 148.) But see Dandridge v. Minge, 4 Rand. 397; Harcum's Adm'r v. Hudnall, 14 Grat. 369.

## 2<sup>n</sup>. Exceptions to the General Doctrine.

There are some chattels in the possession of the wife which the law does not cast absolutely upon the husband;

W. C.

### 1<sup>o</sup>. Things Personal which are in possession of the Wife, in *auter droit*, as Executrix, &c.

In these the husband, notwithstanding the marriage, has *no personal interest*. In right of his wife, he does indeed come into possession of them, but only for the purpose of administering the trust upon which she herself had them. (Bac. Abr. Bar. & F. (C) 3; 3 Th. Co. Lit. 309, & n (O); Id. 311, n (P).) And in Virginia, by statute, even this fiduciary possession is done away with, it being provided that where an unmarried woman, who is a personal representative, either alone or jointly with another, shall marry, her husband shall not be a personal representative in her right, but the marriage shall operate as an extinguishment of her authority. (V. C. 1873, c. 126, § 9.)

### 2<sup>o</sup>. Wife's *Paraphernalia*.

The wife's *paraphernalia* is a term borrowed from the Roman law, and derived from the Greek language, signifying something *over and above her dower*. Our law uses it to signify such apparel and ornaments of the wife suit-

and of her position in society, as are given her by her husband for the use of these persons they are accordingly supposed to be designated for her separate use, and are consequently her's free from his control. *Paraphernalia* are the property of the husband; and if he chooses to dispose of them in his lifetime he is as free to do so, but he cannot deprive his wife of them by his will, nor do they go, at his decease, to his personal representative, except that so far as may be necessary, to pay his debts after exhausting the rest of his estate, the jewels may be appropriated for that purpose: but in no case her necessary apparel.

2 Bl. Com. 435-7; 1 Linn. Ex. 455. & seq.:

1 Bright's H. & Wife, 292

### 3<sup>d</sup>. *Non-liability, by Statute, of Wife's Property to pay Husband's Debts.*

It is enacted in Virginia by statute of March 31, 1875, that the real and personal property of any female, and the rents and profits thence arising, which she owns at the time of the marriage, or acquires afterwards from any other source than her husband, whether the marriage were solemnized before the act or afterwards, if the property were acquired after the act, shall not be liable for the ante-nuptial debts of the husband, nor for any contract in renewal of or based upon a consideration arising or existing before the marriage; and although an action or suit may be maintained against the husband and wife jointly for any ante-nuptial debt of the wife, yet the execution on the judgment or decree in such action shall bind only the estate or property of the wife which she shall own at the time of the marriage, or acquire subsequently thereto, and not that of the husband. (Acts 1874-5, p. 442, c. 359.)

This statute, it will be perceived, does not deprive the husband of his interest in the wife's property, but only shields it from his ante-nuptial debts. It also exempts the husband from liability for the wife's ante-nuptial debts, save only to the extent of the property which comes by her. Whether, if he converts that property, so that it no longer exists in kind, he will be liable for its value, to the

wife's ante-nuptial creditors, the act does not determine.

2<sup>m</sup>. Husband's Interest in the *Wife's Chattels Real*.

Chattels real are interests which concern or savor of the realty, but do not attain to the dignity of estates of *freehold*, and are appointed by the law, upon the decease of the owner, to pass, along with the great bulk of his moveable property, to his personal representative. They consist of *estates* (or *terms*) *for years*; of estates *by elegit*, which are neither more nor less than estates for years; and while the military tenures subsisted, of *wardships in chivalry*, and the like. They are *chattels*, because they pass, like chattels, to the *personal representative* of the owner at his death; and *chattels real*, because they concern or savor of the realty. (2 Bl. Com. 386; 3 Th. Co. Lit. 293.)

Chattels real belonging to the wife in her own right, and not to her *separate use*, are absolutely at the husband's disposal during the coverture. He may sell or charge them as he thinks fit, in whole or in part, but cannot dispose of them *by will*, and to the wife's prejudice; and so much as he does not *absolutely* dispose of during the coverture, at the termination thereof, goes to the survivor—that is, to the wife, if she survives, or else to him. If he merely *charges* them, that does not defeat the wife's right of survivorship, if she survives, unless the charge be enforced, and the debt made out of the property, during the coverture. Hence the term may, at common law, be taken in execution for the husband's debt during the coverture and sold, whereby the wife's survivorship will be defeated; but if a judgment is merely obtained, without seizing the term in execution, and the wife survives, she will have it, for her title by survivorship has relation to the marriage, and is therefore paramount. (2 Bl. Com. 434; 3 Th. Co. Lit. 306, & n (M), 307-'8; 1 Lom. Ex'ors, 406, & seq. Bac Abr. Bar. & F. (C), 2.)

It curiously illustrates the manner of the husband's holding, that if he sell the term *on condition*, and enter for the condition broken, *during the coverture*, he is re-posessed as before, in his wife's right; but if the condition be not broken until after the *coverture ended*, the personal repre-

representative of the husband ought to enter, and the wife's right is barred. (3 Th. Co. Lit. 307.)

If at the time of the marriage the wife has been dispossessed of her term, the husband may either sue alone to recover it, or he may join his wife with him. If he sues alone, his recovery will vest the term absolutely in himself; but if she is joined with him the recovery will be joint, and he will hold it thenceforward, like any other term belonging to her. (1 Bl. Com. 443, n (44); 3 Th. Co. Lit. 307; 1 Lom. Ex'ors, 407; Bac. Abr. Bar. & F. (C) 2.) On the other hand, if the term is not recovered *at all* during the coverture, either by the husband suing alone or by the husband and wife suing jointly, the husband's *marital* rights are at an end; and if he survives he can recover only as his wife's *administrator*, whilst if she survives she is entitled to the term by survivorship. (3 Th. Co. Lit. 307-8; 1 Lom. Ex'or, 405-9.)

Chattels real, in modern times, are well nigh universally *in possession*, and *not in action*. At common law, whilst the feudal tenures remained unimpaired, a right of *wardship*, in case of tenure by knight-service, or a right *valore maritagii*, (to the value of the marriage of the ward), under the same tenure, afforded illustrations of chattels real which might be *in action only*. And in those cases the doctrine was that the husband should not have them at all unless he recovered them in the *life time of the wife*, even though he survived her. (3 Th. Co. Lit. 308.) But at present the only remnant of chattels real *in action*, it is believed, exists in the case of what Lord Coke denominates chattels real of a *mixed nature*, partly in possession and partly in action, as when the husband is seised in right of his wife, *of a rent*, upon which some arrears having accrued, the wife dies; in which case the husband shall have the arrearages, although, if the wife had survived, she should have had them. (3 Th. Co. Lit. 308.)

### 3<sup>rd</sup>. Husband's Interest in the Wife's Choses in Action.

A *chose in action* is a right arising out of contract, such as a debt, or damages for breach of contract, or for a tort connected with contract, including a legacy or distributive share. (Bouv. Law D. Chose.) And in so far as relates to the

law of husband and wife, a *chose in action* includes also, not without some inaccuracy, the right to damages for torts to the wife's person or property. It is called a *chose* as being a *thing* or *property*; and it is said to be *in action*, because it can be enforced only *by action*. Whilst marriage, as we have seen, is an absolute gift to the husband of all the wife's chattels personal *in possession* in her own right (*choses in possession*, as they are sometimes styled), it is only a qualified gift of *choses in action*; which become the property of the husband *jure mariti* only in case he reduces them into actual or constructive possession during the coverture. Upon such reduction into possession, they are absolutely and entirely his own, and shall go to his executors or administrators, and shall not re-vest in the wife. But if the marriage is determined by the death of either party, or by a divorce *a vinculo matrimonii*, before he has reduced them into possession, his *marital right* ceases; and if his wife survive, either by out-living him or by reason of a divorce *a vinculo*, she takes the property wholly free from any claims on the part of himself, his personal representatives, or his creditors. If he survive her, then, though his claim *as husband* is at an end, yet he has a right to be her administrator (V. C. 1873, c. 126, § 4), and in that capacity may recover such *choses in action*; and having done so, although he must pay therewith all her debts (*ante-nuptial debts* of course) as far as the value extends, yet by the Statute of Distributions (V. C. 1873, c. 119, § 10), he is in general her sole distributee. (2 Bl. Com. 434; 8 Th. Co. Lit. 309-'10 & n (O); *May v. Boisseau*, 12 Leigh, 512; *Browning v. Headley*, 2 Rob. 340; *Dold's Trustee v. Geiger's Adm'r*, 2 Grat. 105; *Vance v. McLaughlin's Adm'r*, 8 Grat. 289.)

The reduction into possession, as already intimated, may be either actual or constructive; *actual* when the money due by virtue of the *chose in action* is paid to and received by the husband or his agent; or *constructive* when, without such actual receipt, acts are done which *change the property* in the subject. Thus it is reduced *constructively* into possession by *judgment* recovered in an action instituted *by him alone* (and followed by execution), when it is admissible for him thus to

sue; by decree in equity, directing payment to him; by an assignment for value, when it is capable of being reduced into possession immediately; or by a release by him. 3 Tl. Co. Lit. 310, n. O; 1 Bright's H. & Wife, 53, 61, 69, 72, 86; Bates v. Daldy, 2 Atk. 205; S. C. 3 Russ. (3 Eng. Ch.) 72, n. O; Honner v. Morton, 3 Russ. (3 Eng. Ch.) 65-9; Heygate v. Annesley, 3 Bro. C. C. 362, & notes; Ld. Carteret v. Paschal, 3 P. Wms. 199; Taliaferro v. Taliaferro, 4 Call. 93; Gregory's Adm'r v. Marks' Adm'r, 1 Rand. 330; Archer v. Colby & ux, 4 H. & M. 410; Vaughan & ux v. Wilson, Id. 452; Dandridge v. Minge, 4 Rand. 397; Browling v. Headley, 2 Rob. 370-72; Yerby & ux v. Lynch & als, 3 Grat. 275, 295, 507; Harcum's Adm'r v. Hudnall, 14 Grat. 379.)

It should be observed, however, that whilst the doctrine above stated is believed to be the prevailing one with us, the later English cases hold that the mere assignment for value, by the husband, of the wife's *choses in action* does not of itself amount to a constructive reduction of them into possession, so as to divest the wife's interest in case she should survive, but that such assignee, like the husband himself, must reduce the *choses in action* into actual possession during the coverture, or else the assignment is a nullity against the wife's surviving. (1 Bright's H. & Wife, 86; Edwin v. Williams, 13 Sim. (36 Eng. Ch.) 309; Le Vasseur v. Scrutton, 14 Sim. (37 Eng. Ch.) 116.) And this doctrine derives not a little countenance in Virginia from the case of Hayes v. Ewell's Adm'r, 4 Grat. 11, 15.

The husband's possession, in order to avail to bar the surviving wife's claim, must be in the character of husband, and not in some other capacity, namely, as executor, trustee, or otherwise. (Baker v. Hall, 12 Ves. 501; Wall v. Tomlinson, 16 Ves. 416; Schuyler v. Hoyle, 5 Johns. C. R. 211; Wallace & ux v. Taliaferro & ux, 2 Call. 471, 474, 476, 490; Blakey v. Newby's Adm'rs, 6 Munf. 70; Livesay v. Helms, 14 Grat. 441.)

If the *chose in action* be of an *equitable* character (that is, such as can be recovered only in a court of equity), the wife is entitled to a reasonable settlement out of it, not only against her



husband, but against all creditors of and purchasers from him; unless the husband has acquired a title thereto by ante-nuptial contract with the wife, or has already made a proper settlement on her. This doctrine, which in consequence of its being administered in the court of chancery, is familiarly known as the *WIFE'S EQUITY*, originated in a favorite principle of that court that "he who asks equity must do it;" but it is now enforced as readily at the instance of the wife herself as plaintiff, as when the husband invokes the aid of the court. (2 Stor. Eq. § 1414; Bosvill v. Brander, 1 P. Wms. 459-'60; Elibank v. Montolieu, 5 Ves. 737; Murray v. Elibank, 10 Ves. 84; S. C. 13 Ves. 1; 1 Wh. & Tud. L. C. 333, 348; Browning v. Headley, 2 Rob. 341, 371; Dold's Trustee v. Geiger's Adm'r, 2 Grat. 98, 104; Poindexter & ux v. Jeffries & al, 15 Grat. 368.)

The doctrine, however, is still applicable to *equitable choses in action* alone; so that, if the husband can recover them *at law*, without the aid of a court of chancery, or has actually obtained possession, without an agreement for a settlement, the *equity* in question does not exist. And when, by being reduced into the husband's possession, the subject has once been released from the wife's claim, it is not afterwards made liable thereto, by reason of any supervenient occasion to seek the aid of a court of chancery. (1 Wh. & Tud. L. C. 350-'51; Poindexter & ux v. Jeffries & als, 15 Grat. 369; Cronie v. Hart & als, 18 Grat. 744.)

The subject of the *wife's equity* is any *property, of whatever description*, which is recoverable only in a court of chancery; and embraces, therefore, as well real estate as personalty. The criterion is not at all the *nature of the property*, but whether or not it is needful to *apply to chancery* to make the interest of the husband or his assignee available. Hence, where the wife's estates were mortgaged by the husband and wife, and the husband becoming bankrupt, his assignee sought to subject the *equity of redemption*, it was determined that the *wife's equity* should prevail; and when, on the other hand, a father, dying *intestate*, left real and personal property to descend and pass to his married daughter, she was held to



have a rightful claim to her equity as to her distributive share of the personalty, which was recoverable in equity, but not as to her portion of the lands, which her husband had a right to enter upon immediately upon her father's death, or if the possession were withheld, to sue for and recover at law. (Sturges v. Champneys, 5 My. & Cr. 97; Murray v. Lord Elibank, (10 Ves. 84), 1 Wh. & Tud. L. C. 334-'5; Poindexter & ux v. Jeffries & als, 15 Grat. 370-'71; Dold Trustee v. Geiger's Adm'r, 2 Grat. 98.)

The *amount to be settled* is in the discretion of the court, which takes into consideration the fortune already received by the husband through the wife, and any previous settlement which may have been made. The true principle is that the provision thus made shall be *reasonable and adequate* upon all the circumstances of the case. Hence, whilst in some cases one-half and three-fourths of the fund in question have been allowed, in others, *the whole* has been settled. The usual practice is to refer it to a commissioner, to enquire and report what would be an adequate and reasonable provision. But the court may decide this question for itself, if there be sufficient material in the record for the purpose; and if it plainly appear that the whole property is not more than adequate, a reference to a commissioner is of course not necessary. (Browning v. Headley, 2 Rob. 340; Poindexter & ux v. Jeffries, 15 Grat. 372; 1 Wh. & Tud. L. C. 353-344; Penn's Adm'r v. Spencer & al, 17 Grat. 85.)

The *time* when the provision in the wife's favor shall take effect is also referred to the discretion of the court, to be determined upon the circumstances of the case. If the husband lives with and supports her, it may be made to take actual effect when he ceases to do so, or at his death, the husband meanwhile enjoying the income, and the principal of the fund being secured for the wife's benefit. But if he has deserted or ill-treated her, or is unable or fails to support her, it will be directed to commence immediately. (Poindexter & ux v. Jeffries and als, 15 Grat. 373; Murray v. Ld. Elibank, Wh. & Tud. L. Cas. 353.)

This *equity of the wife* is so substantial an interest that it will constitute a valuable consideration for a post-nuptial settlement by the husband

upon her (made while the equity subsists), which will be sustained against his creditors, to the extent of the value of the equity. (Murray v. Elibank, 1 Wh. & Tud. L. C. 354; Poindexter & ux v. Jeffries & als, 15 Grat. 373.)

The wife's equity extends to a provision for her child, as well as for herself; and yet it is so strictly personal to her that she may waive it at any time before the settlement for the joint benefit of her children and herself is actually completed, and may thus defeat the interest of the children. And so, also, if she dies before a decree or an agreement for a settlement is made, the children take nothing. But while they have no right to a settlement independently of *contract or decree*, yet if there be either of these, and the wife die, the children do not thereby lose their interest; nor can the wife, after a contract or decree contemplating and providing for the children, waive the settlement so as to compromise their rights. (2 Stor. Eq. § 1417 & seq.; Murray v. Ld. Elibank (13 Ves. 1), 1 Wh. & Tud. L. Cas. 329, 340 & seq. 352-'3; Scriven v. Tapley, 2 Eden. 327; Hodgens v. Hodgens, 11 Bligh. N. S. 104; Lloyd v. Williams, 1 Madd. 467; Lloyd v. Mason, 5 Hare (26 Eng. Ch.) 149; Fenner v. Taylor, 2 Rus. & My. (13 Eng. Ch.) 190.)

The wife's waiver of her rights must be accompanied with all the solemnities by which the law seeks to protect married women from undue influence and constraint—namely, by a privy examination, separate and apart from her husband, in court, or in pursuance of a commission issued from the court, or perhaps in the manner prescribed by statute for the execution of *conveyances* by married women. (1 Dan. Chan. Pr. 115-'16; 2 Stor. Eq., § 1418; Bac. Abr. Bar. & F. (M); Spurling v. Rochfort, 8 Ves. 175, n (a); 1 Wh. & Tud. L. Cas. 345; V. C. 1873, c. 117, § 4, 7.)

But the wife's equity may be defeated or barred, not only by the *waiver* thereof in due form, but also by the husband or his assignee getting actual possession of the subject before any bill in behalf of the wife is filed, by an *adequate* post-nuptial settlement, or by *any settlement before marriage*, containing a stipulation against her claim; and to a limited extent by the *wife's*

*misconduct*, as by her adultery or desertion. But whilst in this last case she cannot insist on a settlement, having thus lost sight of her conjugal duty, yet it seems that the husband even then will not be allowed in equity to receive the *whole of her equitable property* while he *does not maintain her*; nor, on the other hand, will any portion be assigned to her, at least while she continues in adultery; for, as has been observed by a great judge, "it would be enormous to give it to enable her to keep her gallant"; but if she ceases to live with the adulterer, it may be supposed that equity would not decline to decree her, out of her own estate, something for maintenance, in order to prevent her from relapsing into evil courses. At all events, the fund will be ordered to be *paid into court*, to await such future disposition as circumstances shall indicate. (Murray v. Ld. Elibank (10 Ves. 84), 1 Wh. & Tud. L. C. 347; Salwey v. Salwey, 2 Ambl. 692; Garforth v. Bradley, 2 Ves. Sen'r, 675; Carr v. Esterbrooke, 4 Ves. 186; Ball v. Montgomery, 2 Ves. Jun'r, 197, 199.)

4<sup>m</sup>. Husband's Interest in *Wife's Reversionary Property in Chattels*.

The term *reversionary* is employed, not very happily, to denote interests which are to be enjoyed at a *future time*, and not *in presenti*; with or without an intervening estate in some one else. Thus, a gift of State bonds to B, to take effect at the age of twenty-one, or to A until B attains the age of twenty-one, and then to B, is in either case a *reversionary interest*. To such reversionary interests in chattels belonging to the wife, supposing them to continue reversionary, if she survive the *coverture* (whether the same be terminated by the husband's death, or by a divorce *a vinculo*), she is entitled, by survivorship, not only as against the representatives and general assignees of the husband, but also as against his particular assignee for valuable consideration. But if the coverture outlasts the period during which the interest is reversionary, or if (the coverture being determined by the *death of the wife*) the husband survive such period, so that he is in a condition to reduce the *choses* into possession, the interest belongs to him, or to his assignee; and as between him and such assignee, it will belong

to the assignee not only where the assignment is for value, but also where it is purely *voluntary*. (1 Bright's H. & Wife, 83, &c.; Hornsby v. Lee, 2 Mad. R. 16; Purdew v. Jackson, 1 Russ. (1\* E. Ch.) 1; Honner v. Morton, 3 Russ. (3 E. Ch.) 65; Dade v. Alexander, 1 Wash. 30; Drummond v. Sneed, 2 Call. 491; Wade v. Boxley, 5 Leigh. 442; Browning v. Headly, 2 Rob. 370; Hayes v. Ewell's Adm'r & als, 4 Grat. 11; Moore v. Thornton & als, 7 Grat. 99; Taylor & als v. Yarbrough & ux, 13 Grat. 192; Henry v. Graves, 16 Grat. 248, 254-'5.)

It would seem, however, that if the wife dies before the event happens upon which the reversionary interest comes into possession, the surviving husband or his assignee can take it only as the wife's *personal representative*, and subject to the obligation to pay out of it her ante-nuptial debts (1 Bright's H. & Wife, 41); although there is not wanting very imposing authority tending to show that in such case the husband takes *jure mariti*, and not merely as his wife's administrator. (Wade v. Boxley, 5 Leigh, 442; Henry v. Graves, 16 Grat. 255; Harvey v. Skipwith & als, 16 Grat. 409.)

## 2<sup>1</sup>. Husband's Interest in Wife's *Freehold Lands*.

We have seen what interest the husband takes in the wife's *chattels real*, or terms for years (*ante* p. 303, &c.), and it now remains to enquire into his interest in those lands wherein she has an estate of *freehold*, that is, of *indeterminate duration*, as in fee-simple, for life, or for any other indeterminate period.

He does not by the marriage become absolute proprietor of this species of the wife's property, nor is he entitled to dispose of it at his pleasure; but as the head and governor of the family, the management of it, and the rents and profits thereof, devolve upon him during the coverture, the freehold remaining entire after the husband's death to the wife, or her heirs; unless by the birth of a living child he becomes entitled to an estate *for his life*, by the *curtesy*. The husband and wife are said, therefore, to be seised of the wife's freehold lands *in right of the wife*, in fee or otherwise as the case may be; and whilst his alienation or his charges by mortgage, &c., are good as against himself,—that is, during the coverture, or if he

be tenant *by the curtesy*, during his life,—yet they will avail nothing after his interest is terminated, unless she unites with him in the conveyance in the manner prescribed by law. (V. C. 1873, c. 117, § 4, 7.) At common law, indeed, he had power to transfer the whole estate of his wife, that is, *to discontinue it*, subject only to be avoided by the subsequent entry of the wife, or her heirs. This doctrine, however, is obviated by statute (after the model of 32 Hen. VIII, c. 21), which declares (V. C. 1873, c. 129, § 2,) that “no conveyance or other act suffered or done *by the husband only*, of any land which is the inheritance of his wife, shall be or make any discontinuance thereof, or be prejudicial to the wife or her heirs, or to any having right or title to the same by her death, but they may respectively enter into such land, according to their right and title therein, as if no such act had been done.” (3 Th. Co. Lit. 305, n (L); Id. 112, n (R); Id. 116, & n (U); Bac. Abr. Bar. & F. (C) 1; 1 Bright’s H. & Wife, 112 & seq.; Polyblank v. Hawkins, 1 Dougl. 329; Dejarnette v. Allen & ux, 5 Grat. 512–’13.)

It is further to be observed, that if the husband, or the husband and wife, agree to sell and convey the wife’s lands, the agreement cannot be *specifically enforced* against either of them; not against the wife, because she is incapable of binding herself by any *executory contract*; nor against the husband, because coercion employed against him would amount to the moral coercion of the wife. The only remedy upon such an agreement is an action thereon *against the husband* to recover damages for its breach. (1 Bright’s H. & Wife, 187, & seq.; 2 Stor. Eq. § 731, & seq.; Emery v. Wase, 8 Ves. 514.)

And since the agreement cannot be specifically enforced *against* husband and wife, it follows that, for want of mutuality, it cannot be enforced *by them*. (Watts & al v. Kinney & ux, 3 Leigh, 272, 290.)

The husband’s estate *by the curtesy* is defined to be “where a man *takes a wife seised during the coverture* of an estate of inheritance, legal or equitable, such as that the issue of the marriage may by possibility *inherit* it as *heir to the wife*, has issue by her *born alive*, and the wife dies, the husband surviving has an estate in the land *for his life*, which is called

an *estate by the curtesy*." Its nature and incidents will be more particularly set forth in another place. (2 Bl. Com. 126; 2 Instit's Com. & Stat. Law, c. VIII.)

In describing, *in pleading*, an estate in fee simple in lands which belongs to the wife, it must be averred that the *husband and wife, in right of the wife, are seised in fee simple*, and not in *freehold* merely; and yet the husband is regarded as tenant *of the freehold only*, and therefore has *no right* to commit waste in the lands; though the coverture suspends *any remedy* at common law in her favor against him. Hence, a judgment-creditor of the husband, who extends the wife's lands upon an execution of *elegit*, whilst he succeeds to the husband's legal right to the rents and profits, does not enjoy his immunity from liability for waste. In like manner a lessee or alienee of the husband is liable for waste, and in both cases the action is to be brought in the *name of husband and wife*, she being disabled to sue in her own name. (Bac. Abr. Bar. & F. (C) 1; Dejarnette v. Allen & ux, 5 Grat. 514-'15.)

2<sup>k</sup>. Wife's interest in *Husband's Property*; W. C.

1<sup>l</sup>. Wife's interest in *Husband's Chattels*.

Independently of special agreement by marriage settlement, the wife acquires, in general, by the marriage no other or further interest in the husband's chattels than as his most favored *distributee*, after his death; although, if she appropriate them to her own use, he can have no remedy against her. (McCormick's Adm'r v. McCormick, 7 Leigh, 66.) As his distributee, she is entitled, if the husband leave *issue by her*, to one-third of the surplus remaining after the payment of his debts; and if he leave *no issue by her*, to such of the surplus as was acquired in virtue of the marriage with her, and shall remain *in kind* at the husband's death (subject to charges of administration and debts so far only as the other personal estate of the husband may be sufficient to satisfy the same); and also, if the husband leave issue by a former marriage, to *one-third*, and if no such issue, to *one-half* of the residue of such surplus. But of this distributive share she cannot be deprived by the *husband's will*, nor by any *revocable disposition* which he can make of his chattels, for that would be really testamentary. But he may defeat her claim

by an *irrevocable alienation* of his chattels in his life-time, notwithstanding he may reserve a life-estate therein to himself, or may have had it in view thereby to deprive her of her distributive share. (V. C. 1873, c. 119, § 10; *Lightfoot's Ex'or v. Colgin & als*, 5 Munf. 42, 555; *Gentry & als v. Bailey*, 6 Grat. 604.)

In order to prevent any *testamentary* privation by the husband of the wife's rights as his distributee, she is armed with the power of renouncing the provision made for her by his will within one year from its admission to probate, so that such renunciation be made in person before the court of probate, or by a writing recorded in such court, or in the clerk's office thereof, upon such acknowledgment as would authorize a conveyance of lands to be recorded. In the event of such renunciation, or if *no provision at all* be made for her by the will, she shall have such share of her husband's personal estate as she would have had if he had *died intestate*; otherwise she shall have no more thereof than is given her by the will. (V. C. 1873, c. 119, § 12, 14.) But these provisions in favor of the wife, as distributee of her husband, are all made expressly subject to this qualification,—that if she of her own free will leave her husband, and live in adultery, she shall have no part of the personal estate as to which he dies intestate, unless her husband, after she so left him, be reconciled to her and suffer her to live with him. (V. C. 1873, c. 119, § 13; *Thornton v. Winston*, 4 Leigh, 152; *Dupree, Adm'r, v. Cary & al*, 6 Leigh, 37; *Kinnaird v. William's Adm'r, &c.*, 8 Leigh, 400; *Findlay's Ex'or v. Findlay*, 11 Grat. 434.)

To this general doctrine, that the wife has no interest in the husband's chattels, save as his distributee, a qualification must be noted in respect to her *paraphernalia*, the nature of which has been already explained (*Ante* p. 301-'2). (See also *Bright's H. & Wife*, 286; *Tipping v. Tipping*, 1 P. Wms. 730; *Northey v. Northey*, 2 Atk. 78-'9; *Graham v. Londonderry*, 3 Atk. 393.)

The husband may, of course, bestow articles of apparel and of ornament on the wife, not as her *paraphernalia*, but as her *separate estate*. This, however, is not presumed, since she might then dispose of them absolutely, which would frustrate his purpose of adorning her person for his own



honor and that of the family. But such gifts from other persons, as from her relatives or his, or from strangers, are always taken to be for her separate use, unless the contrary be declared. Wherever they have become her separate property, they are subject to her absolute control, and cannot be interfered with by the husband or his representatives, nor by the husband's creditors, except where they were derived by his gift, made in fraud of his creditors. (1 Lom. Ex'ors, 456; 1 Bright, H. & Wife, 289; Graham v. Londonderry, 3 Atk. 393; McChesney v. Brown, 25 Grat. 393; Burnett & ux v. Hawpe, Id. 481.)

It is scarcely necessary to say that the wife, by agreement before marriage, may bar her right to *paraphernalia*, or to a distributive share of her husband's estate; as, indeed, either party may, in like manner, by ante-nuptial contract, relinquish any right depending on the marriage. (1 Lom. Ex. 457; 1 Bright's H. & Wife, 294; Cholmley v. Cholmley, 2 Vern. 83; Read v. Snell, 2 Atk. 642; Bray v. Dudgeon, 6 Munf. 132; Charles v. Charles, 8 Grat. 486; Findlay v. Findlay, 11 Grat. 434.)

2<sup>1</sup>. Wife's interest in *Husband's Lands*.

The wife, upon marriage, acquires an important interest in her husband's lands of inheritance, of which nothing that he can do will thenceforth divest her without her consent. This interest, which is called her *dower*, is closely analogous to the husband's *curtesy*, and will be fully expounded in another place—(2 Inst. Com & Stat. Law, c. VIII). At present it must suffice to state its definition, which recites its prominent incidents: "*Dower is where a woman marries a man seised at any time during the coverture of, or entitled to a right of entry or action in, an estate of inheritance such as that the issue of the marriage may, by possibility, inherit it as heir to the husband, and the husband dies, the wife surviving is entitled to one-third for her life, as tenant in dower.*" (2 Inst. Com. & Stat. Law, c. VIII; 1 Th. Co. Lit. 569, 578; V. C. 1873, c. 106, § 1, 2.)

The claim to dower is paramount to the husband's *post-nuptial* debts in all cases where the wife has not relinquished her right in due form of law; and is paramount also to his *ante-nuptial* debts, unless before marriage they were charged *specifically* by deed of trust, or the like, upon the land.



Nor can the husband defeat the wife's dower by any alienation, or otherwise, after marriage without her consent, manifested by her executing the conveyance with all the ceremonies (V. C. 1873, c. 117, § 4, 7) which the caution of the law has devised in the case of married women. (2 Inst. Com. & Stat. Law, 168; 1 Th. Co. Lit. 568, n (B); 1 Lom. Dig. 128-'9, 107.)

Dower may be *prevented* from accruing, or having accrued may be *barred* by several devices, which are pretty fully set forth 2 Inst. Com. & Stat. Law, c. VIII. That which is incomparably the most usual and familiar is the wife's *uniting with the husband* in the conveyance in the manner prescribed by law (V. C. 1873, c. 117, § 4, 7), and fully detailed *post*, p. —, and also 2 Inst. Com. & Stat. Law, c. VIII and c. XIX. Another method of *preventing* dower is by *jointure*, which means with us *any estate, real or personal, intended to be in lieu of dower, conveyed or devised for the jointure of the wife, and assented to by her, either before marriage or after the coverture is determined.* (V. C. 1873, c. 106, § 4, 5, 6; 2 Inst. Com. & Stat. Law, c. VIII.)

### 3<sup>k</sup>. Wife's *Separate Property*.

It is possible, and in point of law not unfrequent, for a wife to be possessed of property, real and personal, which shall not be subject to her husband's control, nor to his debts; but which in use and enjoyment, and in power of disposal, shall belong to her exclusively, to all intents and purposes, or at least to most, as if she were a *feme sole*. Property so situated is denominated the *wife's separate estate*. It may arise out of ante-nuptial dispositions made by the wife herself, or by the husband or some third person either before or after marriage. Foreign as such an arrangement is to the settled convictions and policy of the common law, it could not have found a place in our jurisprudence but for the interposition of the court of equity, whose extraordinary jurisdiction in this particular originated through the *doctrine of trusts*, in the latter part of the reign of Edward III (say about A. D. 1370, 2 Inst. Com. & Stat. Law, c. X), and has ever since been maturing, in the main wisely, so as to meet the needs of society, but occasionally with a contemptuous indifference to the common law ideas of the relation of husband and wife, which is

suggested by the analogies of the Roman law, and tends neither to domestic peace nor to the true happiness of married life.

Every kind of property, including estates in fee-simple, and chattels personal and real, may be subject to a trust for the wife's *separate use*, which will be supported in equity; a trust which is effectual against the husband, although the wife be unmarried at the time of its creation, or being then married, have become *discovert*, and afterwards married again. It may, to be sure, be confined in its operation to a particular coverture, but it may also be limited free from the interference or control of *any future husband*; and whether it be one or the other will depend on the terms of the instrument creating the trust. (2 Bright's H. & Wife, 204-'5; 2 Stor. Eq. § 1378 & seq.)

In respect to the *phraseology* which suffices to create a separate estate in the wife, it is to be observed that the husband's *legal rights* to the wife's property by virtue of the marriage, and its obligations, are neither to be cancelled nor abridged, save in pursuance of an intention to that effect *plainly manifested*. The mere fact of vesting property *in trustees*, in trust for the benefit of the wife, does not create in her favor a separate estate therein. (2 Bright's H. & W. 206; 2 Stor. Eq. § 1381 & seq.; 1 Bish. Mar. Wom. § 839, n (2); Brown v. Clark, 3 Ves. 166; Lambe v. Milnes, 5 Ves. 521; Rich v. Cockell, 9 Ves. 377; Pickett v. Chilton, 5 Munf. 481; Lewis v. Adams, 6 Leigh, 320, 331, 335; Mitchell v. Moore & als, 16 Grat. 280; White v. White, 16 Grat. 264; Buck & als v. Wroten & ux, 24 Grat. 253.)

Hence a legacy to a married woman for her "*own use and benefit*;" to her "*own proper use and benefit*;" "*to be under her sole control*;" "*to be paid into her own proper hands, to and for her own use and benefit*;" to a woman and her assigns, "*for her and their absolute use and benefit*;"—is not by any of these expressions constituted the *wife's separate property*. (2 Bright's H. & W. 206 & seq.; 2 Stor. Eq. § 1383; Hulme v. Tenant (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 376-'7; Taylor & als v. Yarbrough & ux, 13 Grat. 183; White v. White & als, 16 Grat. 268.)

On the other hand, where the gift is "*to her sole and separate use*;" "*to her sole use, benefit and dis-*

position;" "for her own use and *at her own disposal*;" "for her own *sole use*;" "for her *sole use and benefit*;" "*free from the power* of her husband;" "for her own use and benefit, *independent of any other person*;" "to *enjoy* and receive the issues, and receive the issues and profits;" "*for her livelihood*;" "*the wife's receipt to be a sufficient discharge* to trustee;" "*the annual produce* to be paid into her proper hands;" "the securities to be delivered up to her *whenever she shall require*;" "for her *support and maintenance*;" "the profits to be paid to her *separate use*;"—these expressions have been interpreted to create a *separate estate in the wife*; for which, it will be observed, no precise terms of art are needful, but only a clear manifestation, from the language taken in conjunction with the surrounding circumstances, of an intent to exclude the power and marital rights of the husband. (2 Bright's H. & Wife, 210 & seq.; 2 Stor. Eq. § 1382; Hulme v. Tenant, (1 Bro. C. C. 16), 1 Wh. and Tud. L. C. 376-'7; Tyrrell v. Hope, 2 Atk. 558; Darley v. Darley, 3 Atk. 399; Stanton v. Hall, 2 Rus. & My. 180; Scott & ux v. Gibbon, 5 Munf. 90; Smith v. Smith's Adm'rs, 6 Munf. 581; West v. West's Ex. 3 Rand. 373, 377; Lewis v. Adams, 6 Leigh, 320, 335; Cleland v. Watson, 10 Grat. 159; Nixon v. Rose, 12 Grat. 428; Taylor & als v. Yarbrough & ux, 13 Grat. 183.)

The husband's marital rights, however, let it be repeated, will never be divested to a greater extent than the terms of the settlement clearly require; so that when by the settlement she is allowed to dispose of certain property *by deed or will*, but dies without making any disposition of it, there is no separate estate created, and the husband surviving is entitled, as her distributee, to the personalty. (Moloney v. Kennedy, 10 Sim. (16 Eng. Ch.) 254; Mitchell v. Moore, 16 Grat. 275.)

There is also a distinction between the case of a gift or bequest to a *married woman*, on the one side, and on the other to an *unmarried woman*, not in contemplation of an immediate marriage, nor as a provision for that event. Thus the words "to be at her own disposal," "for her sole and separate use," occurring in a gift or bequest to an *unmarried woman*, may not always create a separate estate, to be enjoyed by her independently of any future husband; whilst, as we have seen, such expressions in respect to a married woman, or in contemplation

of marriage, would certainly have that effect. The doctrine upon this point, however, is not precisely settled. (2 Stor. Eq. § 1384, & n 1; Buck & als v. Wroten & ux, 24 Grat. 253.)

The interposition of trustees, which at first was supposed to be necessary in order to protect the wife's separate estate, has not been deemed indispensable since about 1725. It being a fundamental maxim of equity never to suffer a trust to fail for want of a trustee, where it is plain that a separate estate in favor of the wife is intended to be created, either by an actual conveyance, or by a distinct and irrevocable agreement to convey, a court of chancery will effectuate the design by designating a trustee, either the husband himself or some other person, as circumstances may indicate. Hence, when property is given to a married woman *as her separate estate*, without naming the trustees, and *a fortiori* when it is given *to the husband for her separate use*, the husband will be, in equity, regarded as her trustee, and at the discretion of the court he may be superseded, and another person appointed trustee. Nay, further, if the husband *before marriage* agrees in writing that his wife shall be entitled to specific parts of his or her estate, to her separate use, but in consequence of no settlement having been actually made, the legal title remains, or becomes vested in him by the subsequent marriage, a similar doctrine is applicable, and the husband will be held, in equity, to be a trustee to her separate use. (2 Bright's H. & Wife, 214 & seq.; Lucas v. Lucas, 1 Atk. 270; Bennett v. Davis, 2 P. Wms. 316; Lee v. Prieaux, 3 Bro. C. C. 381; McLean v. Longlands, 5 Ves. 79; Parker v. Brooke, 9 Ves. 583; Rich v. Cockell, 9 Ves. 369; Davidson v. Atkinson, 5 T. R. 434; Sayers v. Wall, 26 Grat. 354.)

And although, in consequence of husband and wife being deemed in law *one person*, neither can *at law* make a conveyance directly to the other (1 Th. Co. Lit. 130 & seq.); yet in equity conveyances directly from husband to wife, without the intervention of trustees, have long been sustained where clearly proved, so only that his creditors are not prejudiced, and in general, also, that the husband shall not divest himself of the whole, or of an unreasonable proportion of his estate, which would place him in an attitude of unnatural and unbecom-

ing subordination to his wife, adverse to domestic felicity, and to public policy. But under circumstances showing the existence of a strongly meritorious consideration, a conveyance even *of the whole* of the husband's property to his wife has been sanctioned. (2 Stor. Eq. § 1374; Lucas v. Lucas, 1 Atk. 270; Beard v. Beard, 3 Atk. 72; Slanning v. Style, 3 P. Wms. 334, 338; Walter v. Hodge, 2 Swanst. 92, 107; Shepard v. Shepard, 7 Johns. Ch. 63; Jones & ux v. Obenchain & als, 10 Grat. 259; Sayers v. Wall, 26 Grat. 373; *Ante* p. 293-'94, 2<sup>k</sup>.) And by means of the Statute of Uses, land may be conveyed by the husband to the wife directly, so as to vest in her a *legal title*, namely, by covenanting *with a third person, a stranger*, in consideration of natural love and affection for the wife, to *stand seised to her use*. The *statute* then takes the possession out of the husband and vests it in the wife. (1 Th. Co. Lit. 130; 2 Insts. Com. & Stat. Law, 856; *Ante* p. 293, 2<sup>k</sup>.)

The wife cannot in like manner convey directly to the husband (except her separate property or by power of appointment), because, save in those cases, no conveyance of a married woman is valid even in equity, unless made in pursuance of the provisions of the statute upon the subject (V. C. 1873, c. 117, § 4, 7), one of which is that the husband and wife shall *unite in the conveyance*, and it would be an incongruity, which might give even a court of equity pause, that *husband and wife* should convey to the *husband*; besides that the wife in such a case would no longer have that protection to her interests which the junction of the husband with her was designed to confer. However, the object is easily attained by the husband and wife uniting, in pursuance of the statute, in a conveyance to a third person, who shall immediately convey to the husband. (Shepperson v. Shepperson, 2 Grat. 501; Switzer v. Switzer, 26 Grat. 583.)

It will easily be apprehended that, since the reason of the inability of husband and wife, respectively, to convey directly, the one to the other, is their *oneness* during the coverture, so when the coverture ceases, the inability is at an end. Hence, the wife may take from the husband by devise or will, or by donation *mortis causa*, because none of these take effect until, by the husband's death, the coverture is terminated. And so the husband may

take from the wife by similar means, when she by power of appointment, or by reason of a separate estate, is capable of making such dispositions. (1 Th. Co. Lit. 131-'2, n (9) and (N); V. C. 1873, c. 118, § 3.) And lastly, upon this point, it is to be observed that husband and wife may respectively convey the one to the other, when he or she acts *in auter droit*, by virtue of a power of appointment, or as attorney in fact for a third person; for in such case the interest passes not from the consort, but from the third person. (1 Th. Co. Lit. 130, & n (6), 131.)

There is one peculiar sort of separate interest, in the nature of a *separate estate*, which the wife may derive from her husband, which demands some notice, namely, *pin-money*. Pin-money is a provision made by the husband, sometimes by or in pursuance of marriage-contract, but more frequently *by gift* from him to the wife, for the specific purpose of supplying her with articles of dress, and with pocket-money, in order to prevent the annoyance of a constant recourse to him with petty demands for personal expenditure. It may consist of gifts of money made from time to time, or of a specific periodical allowance, or of the savings and profits accruing from her domestic management; but in either case, if it is not to the prejudice of the husband's creditors, or if it be by virtue of an antenuptial contract, the wife acquires in equity an unimpeachable right of property therein, subject only to *two qualifications*; namely, *first*, that as it is bestowed for the specific purpose of decking her person, for the credit of the common household, the husband has a certain interest in it, as well as the wife, and may demand, perhaps may *constrain*, the expenditure to be made accordingly; and *secondly*, that even though stipulated for by a marriage settlement, she cannot call upon her husband to pay *any arrears*, if he has meanwhile provided for her current wants, nor in any event to pay beyond the arrears of a single year; nor, it seems, can her personal representative demand any arrears at all; for the money is designed to dress and adorn the wife during the year, with a view to maintain the dignity of the husband and his family, and not for the accumulation of the fund. (2 Bright's H. & Wife, 288 & seq.; 2 Stor. Eq., § 1375, 1375 a; Slanning v. Style, 3 P. Wms. 337;



Acton v. Acton, 1 Ves. Sen. 267; Peacock v. Monk, 2 Ves. Sen. 190; Fowler v. Fowler, 3 P. Wms. 355; Ball v. Coutts, 1 Ves. & B. 305; Howard v. Digby, 8 Bligh N. R. 269 & seq.) In this particular, a distinction must be noted between *pin-money*, and the proper *separate estate* of the wife, of which latter the arrears received by the husband, or not paid by him, are generally demandable by the wife at least for a year, and in full, if the wife has so insisted upon her right as to repel the presumption that she has relinquished the arrears to the husband. But even in case of a *separate estate* proper, the omission of the wife to make any demand is, in general, proof of such relinquishment of the arrears. (2 Bright's H. & Wife, 261, 259, &c.; Moore's Ex'x v. Ferguson, 2 Munf. 421; Roper v. Wren, 6 Leigh, 38.)

We are next to consider the wife's *power of disposition* over her separate estate, of which a brief and excellent summary is to be found in 2 Bl. Com. 293, n (12). See also 1 Bish. Marr'd Wom. § 860, 869, & notes.

In respect to *personal property*, it has been settled for almost, nay indeed for more than, a century, that a married woman being entitled to a *separate estate in chattels*, or in the *produce of lands*, may dispose of it freely, by will or otherwise, precisely as if she were a *feme sole*, save only when it is otherwise provided by the instrument whence she derives the estate. She takes such property, with all its privileges and incidents, of which not the least important is the *jus disponendi*. And this principle of free disposition by the wife prevails without regard to the circumstance whether the property be in possession or reversion; and applies as well to the produce and accretions, or savings, as to the principal subject itself. (1 Th. Co. Lit. 132, n (N); 2 Bright's H. & Wife, 220 & seq.; 2 Stor. Eq. § 1393; Grigby v. Cox, 1 Ves. Sen. 518; Peacock v. Monk, 2 Ves. Sen. 191; Fettiplace v. Gorges, 1 Ves. Jun. 46, & n (a); Pybus v. Smith, 1 Ves. Jun. 193 & notes; Rich v. Cockell, 9 Ves. 369; Wagstaff v. Smith, 9 Ves. 520; Sturges v. Corp, 13 Ves. 190; Essex v. Atkins, 14 Ves. 542, 547; Major v. Lansley, 2 Russ. & My. (13 Eng. Ch.) 353; Gore v. Knight, 2 Vern. 535; West v. West's Ex'ors, 3 Rand. 373, 376, 389, 392; Vizonneau v. Pegram & al, 2 Leigh, 183; Charles v.

Charles, 8 Grat. 486; Nixon v. Rose, 12 Grat. 425; Penn & ux v. Whitehead 17 Grat. 503; Burnett & ux v. Hawpe's Ex'or, 25 Grat. 486; Muller v. Bailey, 21 Grat. 321; McChesney & als v. Brown's Heirs, 25 Grat. 400.)

But as to *real property*, a more rigorous doctrine prevails. If she is not expressly allowed to dispose of that in some designated way, she can do so only *by will* executed as a will of lands is required to be executed (V. C. 1873, c. 118, § 4, 5), or by deed of conveyance, executed with the formalities prescribed by law for married women. (V. C. 1873, c. 117, § 4, 7.) And it seems that permitting her to dispose of lands in some other way than as the statute directs, does not, without negative words, preclude her from the use of these methods. (Lee & al. v. Bank of U. S., 9 Leigh, 209.) Should the wife omit so to dispose of it, the property devolves upon her heirs, of whom her husband is one only by reason of his being her *next of kin*, or by reason of there being *no blood relations* surviving her. The rents and profits of her separate real estate, however, are regarded as personalty, and of them she has the same absolute disposal as of other separate chattels, namely, as if she were a *feme sole*; unless, indeed, they are invested in lands, in which case the *jus disponendi* becomes circumscribed, as already mentioned in respect to that sort of property. (2 Bright's H. & W. 224 & seq.; Peacock v. Monk, 2 Ves. Sen. 191; Southby v. Stonehouse, Id. 610; Hearle v. Greenbank, 1 Ves. Sen. 301; Hodsden v. Lloyd, 2 Bro. C. C. 534; Churchill v. Dibben, 9 Sim. (16 Eng. Ch.) 447, note to Curteis v. Kenrick; West v. West's Ex'or, 3 Rand. 373, 377, 381, 392; Vizonneau v. Pegram, 2 Leigh, 183; Williamson v. Beckham, 8 Leigh, 20; Lee & als. v. Bank of U. S., 9 Leigh, 200; Whiting v. Rust, 1 Grat. 483; Hume v. Hord, 5 Grat. 374; McChesney & al. v. Brown's Heirs, 25 Grat. 400.)

Wherever the wife is at liberty to dispose of her separate estate, whether inherently, as in the case of personalty, where no restriction is imposed, or by appointment in pursuance of the terms of the instrument creating her separate estate, or in the manner prescribed by law, it is a well-established doctrine in equity that she may bestow it as well upon her husband as upon a stranger, although such transactions between husband and wife are



scrutinized with a fitting apprehension of undue influence, and an anxious caution; nor do the courts of equity give sanction or effect thereto without first subjecting the wife to a privy examination apart from her husband, and adopting such further precautions as suffice to ascertain her true and unbiassed will. (2 Stor. Eq., 1395-'6; Bright's H. & Wife, 257; Grigby v. Cox, 2, 1 Ves. Sen'r, 518; Pybus v. Smith, 1 Ves. Jun'r, 189; Essex v. Atkins, 14 Ves. 542; Muller v. Bayly & als, 21 Grat. 529.)

It is admitted that a married woman is, in general, incapable during coverture of *charging her person* by any contract or act whatsoever. But her power of disposition, in respect to her separate property, enables her, to a greater or less extent, to *charge her separate estate* in equity, even by implication, with her debts, contracts, and engagements. The English doctrine is that, by entering into such engagements, she must have meant *to effect something*, and as she cannot have expected thereby to charge *her person*, she could have had no other design than to subject to the fulfilment of her undertaking so much of her separate estate as is subject to her *absolute disposal*, as if she were a *feme sole*; and so (*ut res valeat*) her contract or promise must be construed. And this principle is held to apply whether the undertaking be to pay money or to do a collateral thing, and whether it be verbal or written. The principle is also held to extend to the separate personal estate, and the rents and profits of real property payable to the wife for her separate use, save only where such implied charge is contrary to the restrictions imposed by the instrument which created the estate. Thus, where the estates of the wife, consisting of *freehold* and *leasehold* lands had, by *ante-nuptial* settlement, been conveyed to trustees in trust to receive and pay the profits to the wife, to her separate use, and to convey the estates themselves to such use as she by last will in writing, or by deed or writing, under her hand and seal, executed in the presence of two witnesses, should appoint; and in default of appointment, to the use of her heirs and assigns; the wife having joined her husband as his security in a bond for £180, it was held by Lord Thurlow, in *Hulme v. Tenant* (1 Bro. C. C. 16), that the *leasehold* estates and the rents and profits of the *freehold* were

liable, in equity, to pay the bond. And he expressed the opinion that equity, under like circumstances, would subject the wife's separate estate to discharge *any of her general engagements*. The same doctrine was applied in subsequent cases to the wife's acceptance of a bill of exchange, to her promissory note, to her promise to pay her solicitors for professional services, and in short (as was established by Lord Brougham in *Murray v. Barlee*, and by Lord Cottenham in *Owens v. Dickinson*), is applicable to all her contracts and engagements, whether written or merely verbal; so that it is incorrect in principle to regard such engagements as operating merely as *appointments*. (2 Bright's H. & Wife, 252, & seq.; *Kinge v. Delevall*, 1 Vern. 326; *Lillia v. Airey*, 1 Ves. Jun'r, 277; *Hulme v. Tenant* (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 361 to 363; *Murray v. Barlee*, 3 My. & K. (14 Eng. Ch.) 223; *Owens v. Dickinson*, 1 Cr. & Phill. (18 Eng. Ch.) 53-'4, & n (3).)

The doctrine in the United States touching the power of a married woman *to alienate and to encumber* her separate property is not uniform. In Pennsylvania, Tennessee, Mississippi and South Carolina the courts have adopted the rule, sanctioned also by Chancellor Kent, that a *feme covert* has no power over her separate estate but such as has been specially given her, and can neither charge, encumber nor aliene it further or otherwise than as the instrument creating the estate allows. (*Ewing v. Smith*, 3 Desauss, 417; *Meth. Episc. Ch. v. Jaques*, 3 Johns. Ch. 78; 1 Wh. & Tud. L. C. 371, 375.) In New York (independently of statute) the English rule has been, in the main, followed (overruling in a great degree Chancellor Kent's views), as to the *alienation* of a wife's separate property; but in regard to the power of *charging the estate for debts*, it is held that where creditors do not claim under any charge or appointment, made in pursuance of the instrument of settlement, they must show that the debt was contracted either for the *benefit of her separate estate*, or for *her own benefit*, upon the *credit of the separate property*. (1 Bish. Marr'd Women, § 862, &c., 869, & n 1; 1 Wh. & Tud. L. C. 374; *N. Am. Coal Co. v. Dyott*, 7 Pai. 9, 14; S. C. 20 Wend. 570; *Curtis v. Engell*, 2 Sandf. 287, 289.)

In Virginia, the doctrine as to the *alienation* of

the separate estate of a married woman, is essentially the same as in England. *Personal* property, settled to her separate use, is at her *absolute and unqualified disposal*, except in so far as she is actually restrained, expressly or impliedly, by the terms of the settlement; and real estate she can only convey in the manner appointed for the conveyance of property by married women (V. C. 1873, c. 117, § 4, 7), by will (V. C. 1873, c. 118, § 3), or by appointment, according to the provisions of the instrument which creates the estate. (West v. West's Ex'or, 3 Rand. 373; Vizonneau v. Pegram & al, 2 Leigh, 183; Williamson v. Beckham, 8 Leigh, 20; Lee & al v. Bank of U. S. 9 Leigh, 200; Hume v. Hord & al, 5 Grat. 374; Nixon v. Rose, 12 Grat. 425; Penn & Wife v. Whitehead, 17 Grat. 503, 512; Thorndike & als v. Reynolds & als, 22 Grat. 21; Muller v. Bayly & al, 21 Grat. 521; Burnett & ux v. Hawpe's Ex'or, 25 Grat. 486; McChesney & als v. Brown's Heirs, 25 Grat. 400.)

The doctrine with us as to the power to *charge such separate estate* with the *wife's debts and engagements*, is not so distinctly indicated. If it appear from the terms of the settlement that it was contemplated and designed that the separate property might be charged, it seems that it may be charged accordingly (Muller v. Bayly, &c., 21 Grat. 528-'9); and as to personalty, at least, it seems to have been considered that it may be made liable for her debts *by implication*, as well as expressly. And seeing that the English doctrine, as expounded by Lord Thurlow, in Hulme v. Tenant, has been so far adopted, there is reason to apprehend that it may receive fully the sanction of our courts (as it has now received it), notwithstanding the grievous imposition to which it exposes married women having separate property, taking from them even that protection which legislation, through the medium of the several statutes against fraud and perjuries, has so industriously flung around the other sex, and persons of either sex who are *sui juris* (whose property can only be charged by clear and unambiguous instruments designed for the purpose); and making trusts for the benefit of married women a very precarious protection to their interests. (Woodson v. Perkins, 5 Grat. 351-'2; Penn & al v. Whitehead & als, 17 Grat. 503, 512,

516; Burnett & ux v. Hawpe's Ex'ors, 25 Grat. 488; Darnall & ux v. Smith, 26 Grat. 878.)

It has been all along assumed that restraints *may* be imposed upon the wife, both in respect to *aliening* and *encumbering* her separate estate. The character and extent of those restraints are now to be considered. It is a well known principle, that it is not in general in accordance with the policy of the law to admit of restrictions upon the alienation of property and the right to charge it to the extent of the incumbrancer's ownership at law or in equity (Brandon v. Robinson, 18 Ves. 429; Woodmeston v. Walker, 2 Rus. & My. 197; Brown v. Powell, 5 Sim. (7 Eng. Ch.) 663.) But in the case of married women, equity, in introducing the anomaly of a separate estate in the wife, found it needful, or at least though fit, to enforce, in respect to such separate estate, severe restrictions upon that freedom of disposition which usually attaches inherently to all property; that is, as in equity she acquires by the settlement certain faculties, unknown to the common law, to act as a *feme sole*, so the nature and extent of those peculiar faculties are to be collected from the terms of the instrument out of which they arise. Such restrictions may be imposed in respect to the *mode* of disposition, as that it shall be by *deed only*, or by *will only*, or by *writing* attested by one or by any number of witnesses, and not otherwise; or they may have reference to the *anticipation* of the income; or they may involve an absolute prohibition to aliene, or to encumber at all, whilst the woman continues a *feme covert*. (2 Bright's H. & Wife, 274 & seq.; Jackson v. Hobhouse, 2 Meriv. 483; Parker v. White, 11 Ves. 209, 221; Pybus v. Smith, 3 Bro. C. C. 347; Barton v. Briscoe, 1 Jac. (4 Eng. Ch.) 603; McChesney v. Brown, 25 Grat. 393; Burnett v. Hawpe, Id. 481; Darnall v. Smith, 26 Grat. 878.)

The intention to restrict, and especially to prevent "anticipation" of the income, must plainly appear, for *prima facie* the *jus disponendi* is incident to the separate property of the wife, as to all other property. Hence it is not enough, in order to produce this effect, to direct that the "profits shall be paid from *time to time* into the *proper hands* of the wife," which means no more than to confer a separate estate; nor that the "profits shall be paid to such persons, and in such manner as the

wife shall from *time to time*, during her life, notwithstanding her coverture, by any note or writing appoint, and in default of appointment, into her *proper hands*, for her separate use;" nor that the profits should be paid "as the same *become due and payable*, into the hands of the wife, and *not otherwise*; and the *receipts of the wife alone* for what should be actually paid into *her own proper hands*, should be a sufficient discharge." (Pybus v. Smith, 1 Ves. Jun. 189; S. C. 3 Bro. C. C. 340, n (1); Clarke v. Pistor, 3 Bro. C. C. 346, n †; Parker v. White, 11 Ves. 222; Acton v. White, 1 Sim. & Stu. (1 Eng. Ch.) 429; Medley v. Horton, 14 Sim. (37 Eng. Ch.) 222; McChesney v. Brown, 25 Grat. 393; Burnett & ux v. Hawpe, Id. 481.)

On the other hand, such restriction upon alienation, and upon the anticipation of the income, is held to be created by a direction that the trustee "*shall receive the income* of the property when and as often as the same *shall become due*, and pay it to such person as the wife shall from *time to time* appoint, or *permit her to receive it* for her separate use, and that her receipts, or the receipt of any person to whom she may appoint the same *after it shall become due*, shall be a valid discharge;" and *a fortiori* by an express prohibition to the affect that the subject "*shall not be sold or mortgaged*;" or by a direction to the trustees to pay the "profits to such person, and for such purposes as she by any writing, notwithstanding her coverture, from time to time, when and as the same *shall become due*, but *not by way of assignment, charge, or other anticipation thereof*, direct or appoint, and in default of appointment, into her own proper hands, for her separate benefit, free from the debts and control of her husband; for which purpose the receipts in writing of the wife, or of her appointee as aforesaid, shall, notwithstanding her coverture, be an effectual discharge; or by a direction to pay the "profits to such persons as the wife shall by writing (except *in any mode of anticipation*) appoint, and in default of appointment, into her own hands, for her separate use." (2 Bright's H. & Wife, 278 & seq.; Field v. Evans, 15 Sim. (38 Eng. Ch.) 375; Steadman v. Poole, 6 Hare, (3 Eng. Ch.) 193; Harnett v. Macdougall, 8 Beav. 187; Moore v. Moore, 1 Coll. (28 Eng. Ch.) 57; Baggett v. Meux, 1 Phil. (19 Eng. Ch.) 628.)

Clauses restraining anticipation operate *only during coverture*; for whilst equity upon occasion will modify, in case of its creature, the separate estate of a married woman, the doctrines, in general applicable to property, yet as soon as the wife becomes *dis-covert*, the right of alienation, which is incident to ownership, immediately resumes its full force. The imposition upon alienation of a fetter, unknown to the common law, is permitted so far as the power is created by equity, but no farther. It has, therefore, been made a question whether such restrictions might be lawfully imposed by a settlement made before marriage, or in reference to any subsequent marriage which might be thereafter contracted by the woman. And this question was at first resolved in the negative, in more than one case (as in *Newton v. Reid*, 4 Sim. (6 Eng. Ch.) 141; *Brown v. Pocock*, 5 Sim. (7 Eng. Ch.) 663; *Massey v. Parker*, 2 My. & K. (7 Eng. Ch.) 174); but the obvious inconvenience of such a solution, as, for example, in making it impracticable for a father to *secure* a support for his unmarried daughter, against the improvidence of a *future* husband, has led to the final establishment of the doctrine that, whilst clauses in restraint of alienation, by anticipation or otherwise, will not extend beyond an existing coverture, unless it be clearly so intended, yet such restrictions, when plainly applicable to a future coverture, are valid; but with this qualification, that during any intervening *dis-coverture*, the power of alienation is necessarily complete. If, however, the wife, whilst thus *dis-covert*, makes no disposition of the property, the restraining clause, which was suspended during that period, upon her subsequent marriage will come into operation. (2 Bright's H. & Wife, 285 & seq.; *Tullett v. Armstrong*, 1 Beav. (17 Eng. Ch.) 1; S. C. on Appeal, 4 My. & Cr. (18 Eng. Ch.) 377; *Knight v. Knight*, 6 Sim. (9 Eng. Ch.) 121.)

It is worthy of note that it is competent for one to settle property on trustees in trust to manage the same, and to receive the profits, and to apply them to the support of a husband and wife and their children during the joint lives of the husband and wife and the life of the survivor, remainder to their children; and that in such case neither the trustee nor the *cestuis que trust* can pledge the *prospective* profits of the trust estate, necessary for the



current support of the *cestuis que trust*, to the payment of any debt contracted for their past support, although the debt were contracted by the trustee himself, or by one or all of the *cestuis que trust*. (Markham v. Guerrant & al, 4 Leigh, 279, 285-'6.) Otherwise, the object in view would be effectually frustrated, that object being not to intercept the marital rights and shield the property from the husband's creditors, but to shield it from the improvidence and waste of the husband and his family, and to make that which, under their management, would have been dissipated in a short time, a permanent fund, which should, from its profits, furnish some support to the family during the life of the father and mother, and then be divided among their children. The parties thereby gained a vested interest, to be enjoyed *jointly*, and neither the husband nor any other of the *cestuis que trust* has, during the continuance of the trust, any such *separate interest* therein as can be subjected by the creditors of any of them. If the parties are all *sui juris*, they can, no doubt, by unanimous consent, dissolve the trust and sell the property, whether it be real or personal; and if some of them are infants, a court of chancery, at least in Virginia, might, it is believed, consent for the infants, if it were deemed for their benefit, and might direct the appropriation of the proceeds, even of land, to their support. (V. C. 1873, c. 124, § 2 & seq.; Id. c. 123, § 13.) But without such unanimous consent, it seems that the property must be enjoyed as it is given, and not otherwise. (Markham v. Guerrant, 4 Leigh, 285; Scott & ux v. Gibbon & als, 5 Munf. 90; Roanes v. Archer, 4 Leigh, 550, 568; Perkins v. Dickinson & Co., 3 Grat. 337; Johnston v. Zane's Trustees, 11 Grat. 552, 570; Crawford's Ex'ors v. Patterson, 11 Grat. 370; Nickell & als v. Handley, 10 Grat. 336, 340; Armstrong's Adm'r & als. v. Pitts, &c., 13 Grat. 241.)

The doctrine of the *wife's separate estate* is neatly summed up by Lord Chancellor Cottenham in Tullett v. Armstrong, 4 My. & Cr. (18 Eng. Ch.) 405, in pronouncing his judgment extending the protection of equity to the separate estate, with the qualifications and restrictions attached to it, throughout a subsequent coverture. "When this court," says he, "first established the separate estate, it violated the (existing) laws of property as between husband

and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate, and it was found, as part of such law, that the power of alienation belonged to the wife, and was destructive of the security intended for it. Equity again interfered, and by another violation of the laws of property, supported the validity of the prohibition against alienation. In the case now under consideration, if the *after-taken* husband be permitted to interfere with the property given or settled before the marriage to the separate use of the wife, much of the benefit and security of the rules which have been so established will be lost. Why, then, should not equity in this case also interfere; and if it cannot protect the wife consistently with the ordinary rules of property, extend its own (peculiar) rules with respect to the separate estate, so as to secure to her the enjoyment of that estate which has been so *invented for her benefit*? It is, no doubt, doing violence to the rules of property to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, shall not be subject to the ordinary rules of law as to the interest which the husband is to take in it; but it is not a stronger act to prevent the husband from interfering with such property, than it was originally to establish the separate estate, or to maintain the prohibition against alienation. In doing this, I feel that I have much to overcome, of which the observations thrown out by myself in *Massey v. Parker* (2 My & K. (7 Eng. Ch.) 174), is the only part of which I do not feel the important weight. I have to contend with Lord Brougham's observations, in *Woodmeston v. Walker* (2 Rus & My. 197), and the Vice-Chancellor's decisions in *Newton v. Reid*, 4 Sim. (6 Eng. Ch.) 141; *Brown v. Pocock* (2 Rus. & My. 210); *S. C.* 5 Sim. (17 Eng. Ch.) 663; *Malcolm v. O'Callaghan* (4 My. & Cr. (18 Eng. Ch.) 399); *Johnson v. Freeth*, 6 Sim. (9 Eng. Ch.) 423, n; and *Davies v. Thornycroft*, 6 Sim. (9 Eng. Ch.) 420.

"In establishing the validity of the separate estate, with its qualifications (which constitute its value),—that is, the prohibition against anticipation



—I am not doing more than my predecessors have done for similar purposes.”

It is proposed to advert to but one more topic connected with this equitable doctrine of the wife's separate estate—namely, her *separate trading* with such estate, together with her own and her husband's liability, respectively, in consequence thereof.

It is established that a married woman may engage in trade on her separate account, and may enter into a partnership for that purpose, by the *consent of her husband*. When the husband agrees *before marriage* that the wife may thus carry on business on her separate account, the marriage is a valuable consideration, and the agreement will be maintained as well against the husband's creditors as in respect to himself; if made *after marriage*, it is always good as against the husband, and if founded on valuable consideration, prevails against his creditors also. If *trustees* be interposed, the wife's transactions, in her trading operations, will be considered as conducted by the wife, as *their agent*, her possession will be regarded as their possession, and the increase and profits of the trade will accrue to them for her sole and separate use and benefit. The trustees will then be entitled to *recover at law*, upon all demands accruing due in pursuance of the wife's operations, and will be answerable *at law* for all liabilities arising out of the same, with this qualification: that if the wife takes a security payable *to herself*, without describing herself as agent, the husband alone can sue upon it *at law*, although in equity the trustees or the wife may recover upon it; and if she executes a security in her own name, and not as agent, no action at law can be maintained thereon; but the remedy is either at law, upon the implied contract of the trustees, or in equity against the wife's separate estate. But if, on the other hand, there are *no trustees*, but the trade is conducted merely by the consent of the husband, with the wife's separate estate, the husband will stand as trustee, having the same rights and being subject to the same liabilities as a trustee, as in equity the rights of the wife, and the liability of her separate estate, would also be the same as before. But in no case will any *personal liability attach to her*. And so, if the husband desert his wife, and she by the *aid of her friends* is enabled to carry on a separate trade (as that of *milliner*),

her earnings in such trade will be protected in equity against the claims of her husband, apparently because what she gets from her friends is her *separate property*, and his assent to her embarking in business on her own account is implied from his desertion. It seems, however, that the mere circumstance of the husband's absenting himself, or permitting her to trade separately, will not alone, and without other circumstances, divest him of his interest in what she may thus acquire. (2 Bright's H. & Wife, 293, & seq. ; Id. 299, 300; 2 Stor. Eq. § 1385 to 1387; Jarman v. Wolloton, 3 T. R. 618, 620, *in notes*; Dean v. Brown, 5 B. & Cr. (11 E. C. L.) 336; Barlow v. Bishop, 1 East. 432; Saville v. Sweeney, 4 B. & Ad. (24 E. C. L.) 514; Gore v. Knight, 2 Vern. 535; Cecil v. Juxon, 1 Atk. 278-'9; Lampher v. Creed, 8 Ves. 599; Penn & als v. Whitehead & als, 17 Grat. 503; Penn v. Whitehead, 12 Grat. 74.)

As to the ultimate liability of the trustee, or of the husband, for debts contracted by the wife in her separate trading operations, they will be respectively relieved in equity *to the extent of the wife's separate estate*; and according to some authorities the creditors will be in all cases confined to the assets employed in the separate trade. This, however, is not in conformity with the analogy of fiduciaries generally, who if they, or others for them, incur debts in the execution of their trusts, are not as to the creditors relieved from their personal responsibility, except so far as the trust fund suffices to exonerate them. But, of course, if there be trustees named, the personal responsibility, if any, is their's, and not the husband's, who is absolved from all liability for the debts contracted. (2 Bright's H. & Wife, 301.)

If the husband furnish to the business conducted by the wife, on her separate account, labor, skill, capital, or credit, he is to that extent entitled to share in the profits, and his creditors may subject the same to their debts. But of course there are no profits until the creditors *of the concern* are all paid, nor until the expenses of conducting the business, including the support of the husband, wife and family, are liquidated. (Penn & als v. Whitehead & als, 17 Grat. 503, 517.)

4<sup>k</sup>. Husband and Wife, *Tenants by Entireties*.

When land is conveyed to a man and a woman,

and their heirs, they thereby become *joint-tenants* in fee-simple, and if they afterwards intermarry, they continue notwithstanding to be joint-tenants as before. But when the conveyance is made *during the coverture*, to husband and wife jointly, they have neither a joint-estate, nor a sole several estate, nor an estate in common; but their interest is denominated a *tenancy by entireties*. From the unity of their persons by marriage, they have each the whole estate in the premises entirely as one person, and at common law, on the death of either of them, the entire tenement, for all the estate, belongs to the other; and neither of them alone *has power to aliene* to the prejudice of the other's right. Hence, where lands were by will devised to husband and wife, and their heirs, forever, and the wife died, leaving issue, the husband surviving, at common law, takes the whole. (1 Th. Co. Lit. 740, & n (L); 2 Bl. Com. 182; Back v. Andrews, 2 Vern. 120; Green v. King, 2 W. Bl. 1213; Doe v. Parratt & ux, 5 T. R. 654; Thornton v. Thornton, 3 Rand. 182; Norman's Ex'or v. Cunningham, &c., 5 Grat. 63; 2 Insts. Com. & Stat. Law, c. XII.)

So essentially different is a *tenancy by entireties* from a joint tenancy, that the statute in Virginia which abolished the doctrine of *survivorship* as to *joint tenants* was held not to be applicable to tenants *by entireties*; but notwithstanding that statute, the survivor in the case of tenants *by entireties* was held to be *entitled to the whole* (Thornton v. Thornton, 3 Rand. 182; Norman's Ex'x v. Cunningham, 5 Grat. 63); but the present statute in Virginia abolishes survivorship in case of *tenancy by entireties* also, where the estate is *one of inheritance*, and is created by deed or will, *since 1st July, 1850*. "It *hereafter*," says the statute, "an estate *of inheritance* be conveyed or devised to a husband and his wife, one moiety of such estate shall, on the death of either, descend to his or her heirs, subject to debts, curtesy, or dower, as the case may be." (V. C. 1873, c. 112, § 18; Id. c. 209, § 1.) So that if the estate conveyed or devised to husband and wife be an estate *for life*, or *for years*, or if it were conveyed or devised prior to 1st July, 1850, the *survivor would still take the whole*.

## 2<sup>d</sup>. The Effect of Marriage as to Third Persons.

The effect of marriage, in respect to third persons, is chiefly determined by two considerations—namely, that

the existence of the wife is, for most *civil* purposes, merged in that of the husband, so that for such purposes they constitute together but one person; and *secondly*, that the husband's influence over the wife is so great as to deprive her, for the most part, of *freedom of will*.

W. C.

1<sup>st</sup>. Effect, *as to Third Persons*, of the Wife's Ante-nuptial Contracts.

The debts and other contracts of the wife *before marriage* are at common law chargeable on the husband, provided a judgment for them, against husband and wife, is recovered *during the coverture*, for the judgment alters the debt, and makes it *the husband's*. In Virginia, however, at present, by statute, the ante-nuptial debts of the husband are not chargeable on the property derived from the wife, (although it seems that the husband's rights therein are not impaired!) nor is the husband's property, even during coverture, charged with the ante-nuptial debts of the wife. (Acts 1874-'5, p. 442, c. 359.) But supposing no judgment obtained during the coverture, the husband is not, *as such*, by the common law chargeable, at law or in equity, with the ante-nuptial debts of the wife after her decease, nor is his estate, should she survive, not even though he had a large portion with her; as, on the other hand, he is during the coverture liable to all her ante-nuptial debts, although he did not get a shilling with her—nay, although, by ante-nuptial agreement, no part of her property came to him, but was secured to herself. (Heard v. Stamford, Cas. T. Talbot, 173; Powell v. Manson, 22 Grat. 194.) So if a man marries an executrix or an administratrix who has wasted the assets of the estate (which is called a *devastavit*) he is, during the coverture, answerable therefor; and if any of the assets of the estate represented by his wife come to his hands, he is to that extent chargeable in equity, even after the coverture ended. And this doctrine of marital liability applies as well to judgments against the wife *while sole*, as to other debts. Unless there be judgment upon a *scire facias* against the husband and wife during coverture, the husband surviving is not charged therewith, nor his estate if she survives. It exemplifies the tenacity with which this principle is adhered to, that a husband is held, even in equity, to be not answerable after the determination of the coverture for the price of the very goods of which, as husband, he is then in possession. (Bac. Abr. Bar. & F.

(F); *Woodver v. Gresham*, 1 Salk. 116, pl. 7; *Obrvan v. Ram*, 3 Mod. 186; *Thomund v. Suffolk*, 1 P. Wms. 461, 469; *Heard v. Stamford*, 3 P. Wms. 411.)

Evidence of the wife's confession, made after marriage, of her ante-nuptial debt, is not admissible to charge the husband; and yet if the husband die, the wife surviving, or a divorce *a vinculo matrimonii* be obtained before the debt is recovered, the wife is liable. (Bac. Abr. Bar. & F. (F); *Woodman v. Chapman*, 1 Campb. 159; *Sheppard v. Starke*, 3 Munf. 29.)

It may be expedient to add here, that where the cause of action on which the *suit is brought* arose before the marriage, the husband and wife *must always be joined* as defendants; and that is still true, even in Virginia, by the express provision of the statute. (Acts 1874-'5, p. 443, c. 359.) Notwithstanding it proceeds to declare that the execution shall issue against, and the judgment or decree shall only bind the property of the wife. (Bac. Abr. Bar. & F. (F.); *Mitchinson v. Hewson*, 7 T. R. 351; *Richardson v. Hall*, 1 Bro. & B. (5 E. C. L.) 50.)

But whilst the husband's liability, as such, in respect to the wife's ante-nuptial contracts, is limited to the duration of the coverture, save where a judgment has been obtained during that period, yet in general, if the husband has any assets in his hands as her administrator (as in case of her *choses in action* not reduced into possession during the coverture), *they* may still be subject to such contracts. This, however, would not be so if the husband, by marriage-settlement, had become (as he might be), the *purchaser* of the *choses in action* in question. The extent of such a purchase depends upon the terms of the settlement, according to which it may embrace all of the wife's estate, as well what may accrue to her afterwards as what she is entitled to at the date of the settlement, although the inclination of the authorities is to restrict his rights, as purchaser, to *existing interests*, unless the contrary intent be clearly manifested. (*Garforth v. Bradley*, 2 Ves. Sen'r, 677; *Mitford v. Mitford*, 9 Ves. 87, 95; *Carr v. Taylor*, 10 Ves. 579.)

2<sup>d</sup>. Effect of Contracts made by the Wife *during Coverture*; W. C.

1<sup>h</sup>. Effect of Wife's Contracts during Coverture, *as respects Herself*.

Let us consider, (1), The effect of *contracts executory*, made by wife during coverture; and (2), The

effect of *contracts executed* (or *conveyances*), made by or to wife during coverture.

W. C.

1<sup>1</sup>. Effect of *Contracts Executory*, made by Wife during Coverture.

The law considers husband and wife as but one person, the very existence of the wife during the coverture being, in legal contemplation, merged in that of the husband. For this reason, and also because she is supposed to act under his constraining influence, not to say *coercion*, she is, at common law, for the most part incapable of binding herself by any contract or conveyance whatsoever. And this doctrine, so far as relates to *contracts executory*, is unqualified by any statute. The principle applies in general, in full force, notwithstanding the parties are living separate in pursuance of a deed of separation, or even though they are divorced *a mensa et toro*, unless the divorce is accompanied, agreeably to the statute, by a decree of *perpetual separation*, when, it will be remembered, it has, upon the personal rights and legal capacities of the parties, the same effect as a divorce *a vinculo*, save that neither party may marry again during the life time of the other. (V. C. 1873, c. 105, § 13.) There are, however, certain exceptional cases recognized by the law, where a married woman is regarded as having acquired a separate character, and is enabled to contract as if she were a *feme sole*, in which cases she may also sue and be sued without joining her husband. These cases are the following, namely :

(1), Where the wife is a *sole-trader*, by the custom of *London*.

This exception, of course, does not exist in this country.

(2), Where the husband is *civiliter mortuus*, or civilly dead.

Civil death is the state of a person who, though possessed of natural life, has lost all his civil rights, and as to them is considered as dead, so that his will, if he be capable of making one, is admitted to probate, &c. The modes of civil death existing at common law are these: (1), Attainder of treason or felony; (2), Banishment from, or abjuration of the realm; and (3), Entering into religion, *i. e.*, becoming a *monk professed*. None of which appear to be known to the law of Virginia, so that it is believed that there is with us *no such thing as civil death*.

(See *ante* p. 53.) It must be observed, however, that authorities are not wanting that banishment of the husband, or his being sentenced to the penitentiary, or even his voluntary abandonment of the wife, has the same effect in restoring her competency to contract as a civil death. (1 Pars. Cont. 306; Rhea v. Rhenner, 1 Pet. 108.)

(3). Where the husband is an *alien enemy*; or

(4). Where the husband is an *alien*, and has never been in this country.

This last, though sustained by the weight of authority, is not a little discredited by Borden v. Keverberg, 2 M. & W. 64, and Jones v. Smith, 3 M. & W. 527.

See 1 Bl. Com. 443, & n (44); Bac. Abr. Bar. & F. (I) & (M); Compton v. Collinson, 1 Hen. Bl. 350; Beard v. Webb, 2 Ber. & Pul. 105, Marshall v. Rutton, 8 T. R. 545, 547; Kay v. Duchesse de Pienne, 1 Campb. 124; Deerly v. Duchess of Mazarine, 1 Salk. 116; S. C. 1 Ld. Raym. 147; Gregory v. Paul, 15 Mass. 31; Abbott v. Bailey, 6 Pick. 89.

The liability in equity of the wife's *separate estate* to make good her contracts made during coverture, discussed under a previous head, is no exception, it will be remembered, to the doctrine of a married woman's incapacity to *bind herself*, but on the contrary is a direct corollary therefrom. (*Ante* p. 324 & seq.)

A married woman's contract being *not voidable*, but actually *void*, is incapable of confirmation after she becomes *discovert*, and therefore does not even afford a valuable consideration to support a substantive promise made by her after the coverture has ceased. In order that such subsequent promise may be binding on her, there must be some new valuable consideration, actual or implied (as where the new promise is under seal, or in the form of a mercantile security); unless, indeed, where the goods were furnished, during the coverture, *on the faith of her separate estate*. (1 Pars. Cont. 361, and cases cited.)

2<sup>d</sup>. Effect of Contracts executed (or Conveyances made) by or to the Wife during Coverture. W. C.

1<sup>st</sup>. Effect of Conveyances made during Coverture by the Wife.

A conveyance made by a *feme covert*, otherwise than by virtue of a power of appointment, is at common law *absolutely void*, and not merely *void*.



able, and that for the two reasons already mentioned, namely, *first*, because the separate existence of the wife is *extinguished by the coverture* for civil purposes; and *secondly*, because she is justly considered to be so much under the influence of the husband as to have, in matters of business, *no will of her own*. The necessities of society, however, so imperatively required that married women should be enabled, on occasion, to alienate property belonging to them, that, in the absence of legislation, a remarkable device was resorted to in order to accomplish the purpose. This was what is called a *fine*, because it puts an end (*finis*), not only in this, but in other cases where it was used, to all disputes and controversies touching the subject matter. It was founded, as to married women, upon the idea that, although a woman so situated was, for the reasons mentioned, incapacitated to convey, yet still, in the interest of adverse claimants, she was *liable to be sued* (together with her husband), and thus to have asserted against her any demand which might exist, in like manner as if she were a *feme sole*, save only that the husband must be joined with her.

The plan of the *fine*, therefore, was that a suit (real, but collusive), should be instituted by the intended purchaser against her, as if *in invitam* (her husband being a party with her, of course), the purchaser affecting to claim the land by a title paramount to her's. Thereupon, leave to *agree the suit* is obtained, and a compromise is submitted, whereby the defendants (the husband and wife) acknowledge the subject in question to be indeed the property of the complainant (the intended purchaser). But before the court will allow this adjustment, or *concord*, as it is called, to be entered of record, the *feme covert* must be examined privily and apart from her husband, by the court, or one of the judges, or else by certain functionaries appointed as commissioners for the purpose, in order to determine whether she enters into the transaction willingly and freely, or by compulsion of her husband. The judgment of the court is then entered accordingly, ascertaining the land to be the *property of the intended purchaser*; and thus, by this roundabout contrivance, both obstacles to the conveyance are obviated; the *oneness* of the wife with the husband *by the suit*, apparently *in invitam*, and the supposed constraint of his influence, *by the*



*privy examination*. A similar result might also have been effected by the more recently invented, but very similar device of *common recoveries*. (1 Bl. Com. 444; 2 do. 293, 348 & seq., 357 & seq.; Id. App'x. 449; 2 Th. Co. Lit. 219 & n (F); Id. 610, n (1); 1 do. 133; 2 Inst. Com. & Stat. Law, c. XIX.)

A mode of conveyance so cumbrous and expensive as that by *fine* or *common recovery* was not at all adapted to the infant settlements in Virginia, so that at an early period (A. D. 1674, 2 Hen. Stats. 317) the Colonial Assembly gave the sanction of law to an already prevailing usage, whereby a married woman's conveyance was made by ordinary deed, accompanied by the *privy examination* of the wife, apart from her husband, by certain designated functionaries, a method generally prevalent in the United States, and so obviously convenient that it has at length been recently introduced by several statutes into England (3 & 4 Wm. IV, c. 74; 8 & 9 Vict. c. 106; 19 & 20 Vict. c. 108). See Wms. Real Prop. 47, 212-'13.

This statutory method of conveyance by married women, being in the nature of an *exception* to the common law, must be rigorously observed; and every transaction which does not conform substantially to the requirements of the statute is *totally void*. Those requirements, in brief, are that the instrument shall be an instrument of *conveyance of property*, real or personal, and not a power of attorney, or an executory contract of any sort; that *both husband and wife shall be parties* thereto, and shall *sign it*; that the acknowledgment of the wife shall be made *before the functionaries* named in the statute; that the *certificate* of the authorities thus invoked shall state that the wife *was examined privily* and apart from her husband, and that the writing in question was *explained to her*; that she acknowledged the same to be *her act and deed*, and declared that she had *willingly executed the same*, and *wished not to retract it*; and finally, that the writing shall be *duly registered or recorded* as to the husband as well as the wife; and then, says the statute, "Such writing shall operate to *convey from the wife* her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which at the date of such writing she may

have in any estate conveyed thereby as effectually as if she were at the said date *an unmarried woman*; and such writing shall *not operate any further* upon the wife or her representatives *by means of any covenant or warranty contained therein.*" (V. C. 1873, c. 117, § 4, 7; 2 Lom. Dig. 469, & seq.; Bac. Abr. Bar. & F. (I); 2 Inst. Com. & Stat. Law, c. XIX.)

It should be observed that the foregoing principles are applicable specially to a conveyance by a married woman of a *legal or equitable title to her own lands*, or other property other than such as she holds to her *separate use*, or to an *interest* in the lands of her husband; and they require to be modified in their application, as we have seen, to conveyances executed by her as *attorney in fact* for her husband or any other person, or by virtue of a *power of appointment*, or of her *separate estate*. (1 Th. Co. Lit. 132, n (N); *Ante*, p. 304.)

2<sup>k</sup>. Effect of Conveyance made during the Coverture to the Wife.

A conveyance made to a married woman stands upon a different footing from one made by her. The latter, as we have just seen, is, with certain qualifications, *void in toto*; but as to the former, a wife is admitted to be of capacity to purchase of other persons than her husband without his consent, and, as we have seen, may, in equity, or through the intervention of trustees, take from the husband himself. The husband, however, may disagree to a conveyance made by a third person to his wife, and thus divest the whole estate; but if he neither agree nor disagree, the purchase is good. But after his death, albeit he agreed thereunto, yet she may, says Lord Coke, "without any cause to be alleged, waive the same; and so may her heirs also, if after the decease of her husband she herself agreed not thereunto." (1 Th. Co. Lit. 132-'3; Bac. Abr. Bar. & F. (I); *Barnfather & al v. Jordan & al*, 2 Dougl. 452.)

2<sup>h</sup>. Effect of Wife's Contracts during Coverture, as respects the Husband.

We have seen that, by the rules of the common law, a married woman has, in general, no power to *bind herself* by contract, or to acquire to herself, and for her exclusive benefit, any right to a contract made with her. All her contracts made during the coverture, are for her husband's benefit, and all her earn-

ings enure to him, as do also all gifts or grants of chattels to her which are not limited to her *separate use*. And so, if by his authority, or without it, if he ratifies the transaction, she sells property, her husband is to recover the price. But wherever she is the meritorious cause of the debt due (as when it is *for her services*), the husband may at his option sue alone, or join her in the action (in which last case, if he should die before recovery of the demand, it would survive to her). Whether when the wife contracts in her own name, and not in that of her husband, and the other party is not even aware that she is a married woman, the husband may avail himself, according to the doctrines of *agency*, of the contract, without a new assent on the other side, admits of question. There seems, in such case, to be a want of mutuality, which would make the agreement wholly inoperative. (1 Bl. Com. 442-'3, and n (42) (43).)

The husband's liability upon the wife's contracts during coverture, wherever it exists, must be referred to one or the other of the two heads of *agency* or of *duty*.

W. C.

1<sup>1</sup>. Husband's Liability upon his Wife's Contracts made during Coverture, *upon the Score of Agency*.

The wife may be the agent of the husband just as a stranger may be, and the authority, as in other cases, may be either *express* or *implied*, and, according to the general rule which governs all authorities, may be revoked at the husband's pleasure. (1 Bl. Com. 442, & n (42); *Manby v. Scott*, (1 Sid. 109), 2 Smith's L. C. 365.)

If the wife's agency is *express*, its scope and extent will be ascertained by its terms, and the husband's responsibility for any contracts she may make in her representative character, is by no means limited to necessities, but extends to whatever subjects the power embraces, and, in short, is governed by the same rules as in other agencies. (*Ante* 203 & seq.)

The wife's agency, however, is more frequently *implied* than *express*, the implication being for the most part derived from one or the other of the following considerations—namely:

(1). *From the Usage of the Parties*: When the husband has been accustomed to recognize the contracts and dealings of the wife in the particular in question, as binding upon him. (*Ante*, p. 204, 1<sup>m</sup>.)

(2). *From the custom of the neighborhood*: Where-

by particular transactions are usually managed by the mistress of the family.

(3). *From the husband's voluntarily and knowingly taking the benefit of the contract:* As where he consciously suffers his wife to wear or use articles of dress or jewelry purchased by her. (*Ante*, 206, 4<sup>m</sup>.)

(4). *From the peculiar circumstances of the husband's family:* As where, by long absence on a distant journey, or by protracted illness, his personal attention to his domestic affairs is rendered impossible. (*Ante*, p. 206, 3<sup>m</sup>; 1 Bl. Com. 442, & n (42); Reeve's Dom. Rel. 79, 80; 1 Pars. Cont. 287; Bac. Abr. Bar. & F. (H); Smith's Cont. 411, & seq.)

Hence, where in one case the wife had bought a large quantity of jewelry, and in another costly articles of dress, in both instances beyond her husband's station in society and means, without the husband's actual knowledge or authority, and it did not appear that she had ever in his presence worn any of the articles, or that he had ever recognized or allowed any similar transactions by her, he was held not to be liable. (*Montague v. Benedict*, 3 B. & Cr. (10 E. C. L.) 631; *Seaton v. Benedict*, 5 Bingh. (15 E. C. L.) 28; 2 Smith's L. C. 352, 356, 359.)

On the other hand, it does not affect the husband's liability on the score of agency that the wife has been guilty of adultery, although he may have abandoned her in consequence, if he has neither expressly nor impliedly revoked her authority as his agent. Thus, where a party, having detected his wife in an adulterous intercourse, separated himself from her, leaving her, however, with two children bearing his name, still in the occupancy of the house in which they had cohabited, without provision for support, and giving no notice to the neighboring tradesmen not to furnish her with supplies on his credit, he was held liable for such articles. (*Norton v. Fazan*, 1 Bos. & Pul. 226; *Manby v. Scott* (1 Sid. 109), 2 Smith's L. C. 366.)

2<sup>1</sup>. Husband's Liability upon his Wife's Contracts made during Coverture, *upon the score of duty.*

The husband is under a *moral* obligation to supply his wife with *necessaries* suited to her station, or that station which he knowingly *permits her to assume*. Nor is that obligation a gratuitous one. Upon the marriage he becomes absolutely the owner of her chattel-property in possession, and entitled to appropriate her *choses in action*, to dispose at his pleasure

of her chattel-real, to take the profits of her freehold lands during the coverture, and to receive her earnings. And hence, from this definite duty, thus sustained by such very valuable considerations, the law reasonably implies a promise on his part to pay whoever shall supply such necessities for his wife a reasonable compensation therefor. (*Manby v. Scott, &c.*, 2 Smith's L. C. 364-'5; *Hawkes & ux v. Saunders*, Cowp. 290; *Bac. Abr. Bar. & F. (H.)*.) And this implication, derived, as it is, from his duty, is not terminated by the parties living separately, nor even by a divorce *a mensa*; nor is it capable of being repelled by any, the most peremptory general prohibition not to trust her, however it may be as to prohibitions addressed to particular persons. This obligation of the husband ceases only when his duty to supply the necessities ceases—that is, it is believed, in the following cases alone, namely:

(1). Where the wife refuses, *without sufficient reason* (*e. g.*, of cruelty, or of outrage upon her feelings, as by his introducing his mistress into his house), to live with him, and abandons his house and society.

(2). Where the wife is guilty of adultery.

(3). Where she is supplied by him, or indeed from any source, with necessities, or the means of procuring them, whether the existence of such supply be or be not known to the person who furnishes her the articles in question.

In the first two of these cases, the wife having lost sight of her conjugal duty, the husband is exonerated from any further *marital* obligation to support her; and in the last-named case he has discharged his duty, and can be constrained to do no more. (1 Bl. Com. 442, & n (42); 2 Smith's L. C. 360 & seq., 364, 366; 2 Kent's Com. 146 & seq.; *Bac. Abr. Bar. & F. (H.)*.)

With us (however it may be in England), the wife who is obliged by her husband's cruelty or misconduct to leave his house, may compel him, as we have seen, by direct proceeding in equity, for the purpose, to allow her *alimony* (*supra* p. 281, §), which, however, is not to the prejudice of the husband's obligation to pay a stranger for necessities furnished her meanwhile, before she obtains alimony. (*Bac. Abr. Bar. & F. H*; *Hunt v. DeBlaquiere*, 5 Bingh. 13 E. C. L. 350.)

The husband's obligation on the score of duty extends to necessities only, proportioned to his estate

and degree, or to that station which he knowingly allows her to assume; and what are such necessities is a question for the jury in each case. (Bac. Abr. Bar. & F. (H); Smith's Cont. 451.) Servants suitable to the husband's fortune and rank have been held to be such—as a lady's maid to the wife of the Governor of Barbadoes (White v. Cuyler, 1 Esp. 200; S. C. 6 T. R. 176); and so has house furniture, corresponding in like manner to station and fortune (Hunt v. DeBlaquiere, 5 Bingh. (15 E. C. L.) 550). See Montague v. Benedict, 3 B. & Cr. (10 E. C. L.) 631; Seaton v. Benedict, 5 Bingh. (15 E. C. L.) 28; Lane v. Ironmonger, 5 Bingh. (13 M. & W. 368.)

The leading case upon this subject is Manby v. Scott, parts of which are to be found in various books. The argument of Sir Orlando Bridgman, C. J., which is long and amusing, if not satisfactory, is given in Bridgman's Judgments, 229; that of Hale, C. B., in Bac. Abr. Bar. & F. (H); and that of Hyde, J., in 1 Mod. 124. Siderfin's version of the case is to be found in 2 Smith's L. C. 332; and a shorter report in 1 Lev. 4. The report of Levinz, coupled with that of Siderfin, is said to contain the substance of all the arguments on either side. (2 Smith's L. C. 358.)

The earlier cases on the subject are judiciously classed, and the result stated, in Bolton v. Prentice, 2 Str. 1214, note (1).

3<sup>d</sup>. Doctrine touching the *Husband's Liability for the Wife's Torts*.

The husband is liable, in damages, for all assaults, slanders, libels, and other torts committed by the wife towards strangers, and therefore for her *frauds*, as long as the relation continues, notwithstanding the parties have permanently separated. The action, however, is not to be brought against the husband alone for a *tort* committed by his wife, but against the husband and wife jointly. And where the tort complained of is a *fraud*, it must not be a fraud so connected with a *contract* as to be part of the same transaction. No action lies in such a case,—not against husband and wife in conjunction, because if that were allowed, the wife would lose the protection which the law gives her against contracts made by her during coverture; for there is no contract which a married woman would be likely to make, whilst she knew her husband to be alive, which could not be treated as a fraud; nor against the husband alone, for when her conduct is the

cause of the action, he is not liable to be sued by himself, but only in conjunction with her. (1 Bl. Com. 443 n (44); 3 Rob. Pr. (2d Ed.) 216-'17; Id. 219-'20; Cooper v. Witham, 1 Lev. 247; Head v. Briscoe & ux, 5 Carr. & P. (24 E. C. L.) 48; Adelphi Loan Assoc. v. Fairhurst, 9 W. H. & Gord. 429; Cannam & ux v. Farmer, 3 W. H. & H. 698.)

It has been said that husband and wife may not be sued jointly for any tort committed by her in her husband's presence, or with his concurrence, but that in such a case the husband must be sued alone. This, however, seems to be unwarranted by the current of authority. The true doctrine is believed to be that, if the tort be one in which, from its own nature, it is impossible that two should concur in committing it, as *slander*, the husband must be sued alone for his own defamatory words or other wrong, in one action, and must be joined with her in another action for hers. And if the tort be one which, from its nature, a *married woman cannot commit*, the husband alone must be sued. Thus, if husband and wife concur in the act of detaining another's chattels, an action of detinue cannot be maintained against the wife at all, but against the husband only; for, in law, the wife *cannot detain*. And so, it has been said, it is in respect to the action of *trover and conversion*, where it is alleged that the conversion is *to the use of husband and wife*, for it is impossible that the conversion should be *to her use*. (Berry & ux v. Nevys, 4 Cro. (Jac.) 661; Wilbraham v. Snow, 2 Saund. 47 l, & 47 m.) But this has been by some regarded as an excessive refinement. (3 Rob. Pr. (2d ed.) 217-'19; Kayworth v. Hill & ux, 3 B. & Ald. (5 E. C. L.) 685; Catterall v. Kenyon, 3 Ad. & Ell. N. S. (43 E. C. L.) 315.) And at all events, it is agreed that a joint action of *trespass* is maintainable against husband and wife for converting the chattels of another; and, indeed, of *trover* also, if it be laid in the declaration that they were converted *to the use of the husband*. (Wilbraham v. Snow, 2 Saund. 47 l, and 47 m.) On the other hand, where the injury is of a character such that two may join in perpetrating it, as if it be assault and battery, enticing away or harboring another's servant, &c., they may be sued jointly for the tortious act of both; and the acquittal of one will not preclude the plaintiff from recovering on account of the wrong done by the other. (1 Bl. Com. 443, n (44); Bac. Abr. Bar. & F. (L); Id. Detinue; Swithin & ux v. Vincent & ux, 2 Wils. 227; Draper v. Fulkes, Yelv. 165, 166 a, n (1); Fawcet v.



Beavres, 2 Lev. 63; Vine v. Saunders & ux, 4 Bingh. (33 E. C. L.) 96; Roadcap & ux v. Sipe, 6 Grat. 216 & seq.)

Where the husband and wife *must be joined*, the determination of the coverture before a judgment is recovered puts an end to the husband's liability; but if he may be sued alone, the wife's death does not prevent him from being still subjected. (Reeve's Dom. Rel. 71-'2; Anon. 4 Cro. (Car.) 509.)

4<sup>s</sup>. Doctrine touching suits *by and against Husband and Wife*.

This subject has been, to a considerable extent, unfolded in connection with previous topics. It will be expedient, however, to pursue it somewhat more into detail, and in doing so use will be made freely of the admirable analysis to be found in 1 Bl. Com 443, n (44);

W. C.

1<sup>h</sup>. Actions *by Husband and Wife*.

Under this head may be considered, (1), Where the *husband and wife must join*; (2), Where the *husband must sue alone*; (3), Where *husband and wife may join or not, at their election*; (4), Where the *wife may sue alone in courts of law*; (5), Who should sue when the *husband or wife is dead*; (6), Consequences of a *mistake made as to the proper parties*;

W. C.

1<sup>i</sup>. Where *Husband and Wife must Join*; W. C.

1<sup>k</sup>. Doctrine as to the *Ante-nuptial Contracts*, and Causes of action of the Wife *in her own Right*.

The general rule is that, as to *ante-nuptial contracts* and causes of action, *husband and wife must join*. Hence they must join in all actions upon bonds, notes, and other personal contracts made to and with the wife before marriage, whether the breach of the contract were before or during coverture; and also for rent or any other cause of action accruing *before marriage*, in respect of the *real estate* of the wife. So they must likewise join *for torts* to the person, or to the property (real or personal) of the wife, committed before marriage; and also in *real actions* for the recovery of the *wife's lands*; for *waste* committed therein before or after marriage; and in *detinue* for the *charters* of the wife's inheritance; in all which cases the cause of action would survive to her, should she survive her husband or the coverture. (1 Bl. Com. 443, n (44); Bac. Abr. Bar. & F. (K); Id. Detinue, (B); 1 Chit.



PL 32-3: *Dejarnette v. Allen* & ex. 5 Gral. 511 & seq. And it may be observed further, that whenever they are jointly, even in cases where the husband has it in his option to sue alone, if the husband die, or the coverture is dissolved by divorce, pending the suit, the right survives to her; and on her death afterwards the suit must be revived in her name, and not in that of his personal representative. *Archer v. Coffey* & ex. 4 H. & M. 410; *Vaughan & ex. v. Wilson*, 11 452.

2<sup>d</sup>. Doctrine when the *Wife is Executrix or Administratrix*, and the Cause of Action survives to her as such.

In these cases the husband must, for the most part, join with her when he has any right to sue at all: for as her interest is merely in *chose morte*, he can have no pretensions to a right of action, save in conjunction with her. 1 BL Com. 443. n 44: 1 Chit. Pl. 53.

3<sup>d</sup>. Doctrine as to Causes of Action which affect the Wife, *during the Coverture*.

There is but one instance where a cause of action which affects the wife, and survives *during the coverture*, must be asserted by a joint suit—namely, the case of a tort to the *person of the wife*. In cases arising out of a contract, or out of torts to the wife's *property*, the husband either must sue alone or may join his wife or not, at his pleasure. See *supra*, 2<sup>d</sup> and 3<sup>d</sup>.

When an injury is committed to the *person* of the wife *during coverture*, by battery, slander, &c., if the object be to recover for the *person*, *the suffering or loss of* which she has experienced, the husband and wife must *sue jointly*: whilst if it be to recover for the injury done to the *husband*, by the loss of the company and services of the wife, or otherwise, the action should be in *his name alone*. 1 BL Com. 443. n 44: *Newton & ux v. Hatter*, 2 Ld. Raym. 1208; 3 Rob. Pr. 21 *et seq.* 192.

2. Where the Husband must *Sue Alone*.

The cases under this head to which it is desired to direct the student's attention are, 1. Cases of contracts, wherein the wife is concerned, made *during the coverture*: 2. Cases of torts to wife's *personal property*, committed *during the coverture*: 3. Cases of torts to the wife's *person*, committed *during the coverture*; and, 4. Cases of injuries by breach of

contract, or by tort to the husband's property or person, *occurring before or during the coverture*.

W. C.

1<sup>k</sup>. Doctrine in Cases of Contracts wherein the Wife is concerned, made *during the Coverture*.

For the wife's work and labor, or for goods sold or money lent by her during the coverture, the law assigns to her no interest, and raises no promise in her favor. The interest results *to the husband alone*, and in his favor alone a promise is implied; and hence *by him alone* can an action be brought. When, however, the wife is, *by her labor or otherwise*, the *meritorious cause* of the action, and an *express promise* is made to her, the husband, at his option, may either sue alone, or assenting to give her an interest in the contract, may join her in the action, in which last case, if she survive (either him or the coverture), the cause of action will survive to *her*. (1 Bl. Com. 443, n (44); Howell v. Maine, 3 Lev. 403; Brashford v. Buckingham, 3 Cro. (Jac.) 77; Buckley v. Collier, 1 Salk. 114; Weller, &c., v. Baker, 2 Wils. 424; Bidgood v. Way, 2 W. Bl. 1239; Boggett v. Frier & al, 11 East. 301; May v. Boisseau, 12 Leigh, 520; *Post* p. .)

And where a debt, due to the wife before marriage, is merged by a *specialty* (*i. e.* a *sealed instrument*), executed to the husband *alone after coverture*, he alone must sue; and so, if a promise *after coverture*, be made *to the husband*, upon any fresh consideration proceeding *from him* (*e. g.* his forbearance to sue), an action on such promise must be by the *husband alone*. (1 Bl. Com. 443, n (44); Yard v. Eland, 1 Ld. Raym. 368; S. C. 1 Salk. 117; Rumsey v. George, 1 M. & S. 180.)

2<sup>k</sup>. Doctrine in Cases of Torts to the *Wife's Personal Property, Committed during Coverture*.

When the cause of action has its inception, as well as its completion, after the marriage, the husband *must sue alone*, because the legal interest in such property is by the marriage vested in him. But when the inception of the wrong occurs before the marriage, and the completion of it afterwards, the husband may sue alone, having regard to the consummation of the injury, or he may join the wife with him, looking to the inception only. Hence, in a case where goods, which before the marriage had belonged to the wife, were both *taken and converted* during coverture, it was held that the

husband *must sue alone*, whatever form of action he might adopt; whereas if the *taking* occurred before the marriage, and the *conversion* afterwards, the wife may in *trover* be joined or not with the husband, at his pleasure, according as he chooses to regard the conversion as occurring when it actually did, after the marriage, or as taking place *by relation*, at the period of the taking. The action of *detinue*, however, being for the *present detainer*, must in all cases be prosecuted by the *husband alone*; whilst trespass, or trespass on the case, for the ante-nuptial wrong of *the taking*, must always be in the *joint names* of husband and wife. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 84-'5; Bac. Abr. Detinue, (A.); 3 Rob. Pr. (2d Ed.) 188; Nelthorp & ux v. Anderson, 1 Salk. 114, & n (a); Blackburne & ux v. Greaves & als, 2 Lev. 107.)

3<sup>r</sup>. Doctrine in Cases of Torts to the *Wife's Person*, committed *during the Coverture*.

We have seen that where the object of the action is to recover for the *personal suffering or injury* done to the wife, the action *must be joint* by husband and wife both; but where the design is to recover for some special damage resulting to *himself* from the tort to the wife—as, for example, by the *loss of her company or services*, or by reason of *expenses* incurred by him, &c.—the action must be *by himself alone*. (1 Bl. Com. 343, n (44); 1 Chit. Pl. 83-'4; 3 Rob. Pr. (2d Ed.) 192; Russell & ux v. Corne, 1 Salk. 119, & n (b); S. C. 2d Ld. Raym. 1031; Lewis & ux v. Babcock, 18 Johns. 443; Dengate & ux, v. Gardiner, 4 M. & W. 6.)

But if the husband sues, together with his wife, for a cause of action which involves such *special damage to him*, the joint action may still be maintained, if it be otherwise proper, the additional circumstances mentioned being regarded as only matter of *aggravation*. Thus, where husband and wife brought an action of trespass for the false imprisonment of the wife, whereby the *husband's business remained undone*; or until he paid £10; or for assaulting the wife, whereby the husband was *put to charges for her cure*, &c.—those circumstances were considered as aggravations merely, the gist of the action being the *false imprisonment*, for which a joint action was proper. (Russell & ux v. Corne, 1 Salk. 119, & n (b); S. C. 2d Ld. Raym. 1031.)

4<sup>k</sup>. Doctrine in Case of Injuries to the *Husband's Person or Property, before or during Coverture.*

The wife, having no legal interest in the person or property of her husband, cannot join with him in any action for an injury thereto, except only in case of a *malicious prosecution of both*, in which it is held that they *may join*, or the husband may *sue alone*. (1 Bl. Com. 443, n (44); 3 Do. 143; 1 Chit. Pl. 83; *Newton & ux v. Hatter*, 2 Ld. Raym. 1208.)

3<sup>l</sup>. Where the Husband and Wife *may join or not, at their election.*

We are here to consider, (1), The doctrine as to the mode of suing in case of *contracts made during coverture*; and (2), In case of *torts committed during coverture*;

W. C.

1<sup>k</sup>. Doctrine as to Husband and Wife joining or not, at the Husband's election, in case of *Contracts made during Coverture.*

When the contract is made *during the coverture, expressly with the wife*, either alone or in conjunction with the husband, she being the *meritorious cause thereof* (as if it were for her labor or services), the husband, at his election, may *join his wife* in the action, or may *sue alone*. And so, as to an ante-nuptial contract of the wife, if after marriage the other party gives a bond to husband and wife, or for a new consideration, such as forbearance, &c., make a parol (*i. e.*, an *unsealed*) promise to *them both*, they *may join*, or, at his election, the husband may *sue by himself*. If, however, such subsequent bond or promise were made to the *husband only*, he alone can sue. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 33-'4; *Howell v. Maine*, 3 Lev. 403; *Weller, &c., v. Dippers at Tunbridge Wells*, 414, 424; *Alberry v. Walby*, 1 Str. 230; *Ankerstein v. Clarke & als*, 4 T. R. 616; *Philliskirk v. Pluckwell*, 2 M. & S. 395. *Rumsey v. George*, 1 M. & S. 180; *Yard v. Ellard*, 117; S. C. 1 Ld. Raym. 368; *Lee v. Mynne & ux*, 3 Cro. (Jac.) 110; *Cathell v. Goodwin*, 1 Harr. & Gill (Md.), 468; *Schoonmaker's Ex'ors v. Elmendorf & al*, 10 Johns. 49.)

For *rent*, or other cause of action accruing *during the coverture*, on a lease or other contract relating to the wife's *real property*, whether made before or during the coverture, the husband and wife may join, or he may sue alone; as, also, in case of their evic-

tion from a lease for years, granted to them jointly. But the interest and participation of the wife must in all these cases *appear from the pleadings*. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 34; Aleberry v. Walby, 1 Str. 230; Dunston & ux. v. Barwell & al, 1 Wils. 224; Bidgood v. Way, &c., 2 Wm. Bl. 1239; Rose v. Bowler, 1 H. Bl. 106.)

And where husband and wife have recovered judgment for money due to the wife *dum sola*, they may join in an action on the judgment, or the husband may sue alone. (3 Bl. Com. 443, n (44).)

2<sup>k</sup>. Doctrine as to Husband and Wife joining or not, at the Husband's election, in case of *Torts committed during the Coverture*.

In respect to torts to the *wife's person*, we have seen that where the complaint relates to the wife's personal suffering or injury, the action *must* be in the joint names of husband and wife; but if the gist of the action is the injury done to the husband, he must sue alone. But it is established that no *joint action* can be maintained for an alleged *joint tort to both*, save in case of a *joint malicious prosecution* of husband and wife, in which case they may both join in respect to the injury to both, or the husband may sue alone. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 83-'4.)

As to torts to the *wife's personal property*, we have also seen that where the cause of action had as well its inception as its consummation during the coverture, the husband must sue alone, but that if the inception were before marriage, and the wrong was completed afterwards (as in case of goods taken whilst the wife was *sole*, and *converted* after she became *covert*), the suit may be either *joint*, or in the *husband's name alone*. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 85; Russell & ux v. Corne, 1 Salk, 119, n (b); Weller, &c., v. Baker, 2 Wils. 423-'4; Bidgood v. Way, 2 Wm. Bl. 1236.)

It should be observed that the effect of joining the wife in an action when the husband may sue alone, is that, if the husband die whilst the suit is pending, or before the judgment is satisfied, the interest in the subject-matter will survive to the wife, and not to the personal representative of the husband, although if he had sued alone it would have demonstrated his disaffirmance of the wife's interest, and then, upon his death, the cause of action would not have survived to her. (1 Chit. Pl. 35; Coppin

v. ———, 2 P. Wms 497; Day v. Pargrave, cited Philliskirk v. Pluckwell, 2 M. & S. 396, n (b); Bidgood v. Way, 2 W. Bl. 1239.)

4<sup>1</sup>. When the Wife *may Sue alone in a Court of Law*.

A married woman having in law no separate legal existence, cannot, in general, while the relation of marriage subsists, sue without joining her husband, whether for causes of action arising before the coverture, or during its continuance, notwithstanding he may have deserted her; or, although she lives apart from him, and has a separate maintenance, nor even though she be divorced *a mensa*, &c., with an allowance of alimony, unless in the last case there has been super-added to the sentence of divorce a decree of *perpetual separation*, which, it will be remembered, operates upon the personal rights and legal capacities of the parties as a decree of divorce from the *bond of matrimony*, except as to marrying again. (*Ante* p. 274, 2<sup>1</sup>; V. C. 1873, c. 105, § 13.) Nor is she estopped from pleading her coverture, although she has declared herself to be a *feme sole*, and as such executed deeds, maintained actions, and gained credit. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 31; 1 Th. Co. Lit. 133-'4; Bac. Abr. Bar. & F. (M); Hatchett v. Baddeley, 2 W. Bl. 1081; Lean v. Schutz, Id. 1199; Marshall v. Rutton, 8 T. R. 545; Nurse v. Craig, 2 Bos. & Pul. (N. R.) 148; Hyde v. Price, 3 Ves. Jun'r, 443; McNamara v. Fisher, 3 Esp. 19; Lewis v. Lee, 3 B. & Cr. (10 E. C. L.) 291; Bogget v. Frier & al, 11 East. 301; Davenport v. Nelson, 4 Campb. 26; Hookham v. Chambers, 3 Br. & B. (7 E. C. L.) 92.)

The exceptions to this principle are few and well defined, being limited to those cases where the wife, notwithstanding her coverture, is allowed to *bind herself* by her contracts, which occurs, as we have seen (*Ante* p. 337), in the cases following—viz.:

(1). Where the wife is a *sole-trader*, by the *custom of London*, which is not law with us.

(2). Where the husband is *civiliter mortuus*, by reason of abjuration of the realm, or of banishment or transportation, as long as the husband is abroad, in respect to which it may well be doubted whether in Virginia a *civil death* is legally possible. (2 Bl. Com. 443, n (44); 1 Th. Co. Lit. 134 & seq. & n's (P), (Q) and (R); Branch v. Bowman, 2 Leigh, 170; Platner v. Sherwood, 6 Johns. C. R. 118; V. C. 1873, c. 206, § 6 & seq.)

(3). Where the husband is *abroad* and an *alien enemy*. (Deerly v. Duchess of Mazarine. 1 Salk. 116 & n (a); S. C. 1 Ld. Raym. 147.)

(4). Where the husband *is an alien*, and has *never been in Virginia*. According to some authorities, the wife may bind herself by contract, and may sue alone wherever the husband is abroad *and is an alien*, although not an alien enemy, and although he has been here and professes an intention to return in a short time. (Walford v. Duchess de Pienne, 2 Esp. 554; Franks v. Same, Id. 588.) But these cases seem to have been overruled by later decisions, and the doctrine established as above stated—viz., that the husband, being abroad, must be either an *alien enemy*, or must never have been in this country. (Kay v. Duchesse de Pienne, 3 Campb. 123; Marshall v. Rutton, 8 T. R. 345; Gregory v. Paul, 15 Mass. 31.)

(5). Where in Virginia there has been a decree of *perpetual separation*, superadded to a sentence of divorce *a mensa*, &c. (V. C. 1873, c. 105, § 13; *Supra* p. 353.)

In reference to the first four of these exceptions, see 1 Bl. Com. 443, n (44); 1 Chit. Pl. 31-'2; Bac. Abr. Bar. & F. (M); 1 Th. Co. Lit. 133-'4 & seq. & n's (P) and (Q); Hatchett v. Baddeley, 2 W. Bl. 1081; Lean v. Schutz, Id. 1199; Kay v. Duchesse de Pienne, 3 Camp. 123; Bogget v. Frier & al, 11 East. 301; Carrol v. Blencore, 4 Esp. 27.

5<sup>1</sup>. Who should Sue when the *Husband or Wife is Dead*; W. C.

1<sup>k</sup>. Who should Sue *when the Husband survives*.

When the husband survives, he may sue, by virtue of his *marital right*, for anything to which he became *absolutely entitled, as husband, during the coverture*, and for chattels given, or otherwise accruing to the wife, in her own right, during coverture; but not for such as accrued to her in *auter droit*, as executrix, &c. So he may sue in trespass, for injury to the wife's land during coverture. But he cannot sue for arrears of rent accruing, due *after the wife's death* on a lease of her *freehold* lands, made by her before marriage, or by her and her husband, according to the statute (V. C. 1873, c. 117, § 4, 7), afterwards. (1 Bl. Com. 443, n (44); 2 do. 434-'5; Bac. Abr. Bar. & F. (D); 1 Chit. Pl. 35; 3 Th. Co. Lit. 305 & seq., n's (L) and (M); Id. 308; Ankerstein v. Clarke, 4 T. R. 616; Aleberry



v. Walby, 1 Stra. 230; Beaver v. Lane, 2 Mod. 217; Hill v. Saunders, 2 Bingh. (9 E. C. L.) 112.)

Thus, the husband may sue for all *chattels real* of the wife (which belong to him by survivorship), for *arrears of rent* accrued during the coverture, or since its termination, in case of leases of the wife's terms for years, made by the *husband alone* during the coverture; or if made by the wife jointly with him, where the rent is reserved *to the husband*, for such sub-demise, and reservation of rent, is regarded as a disposition *pro tanto*, of the wife's original term, and the rent is the absolute property of the husband; and for *arrears of rent*, accrued *during coverture*, upon a lease of the wife's freehold lands, made by her before marriage, or by him afterwards. (1 Lom. Ex. 518-'19; 3 Th. Co. Lit. 259; Parry v. Hindle, 2 Taunt. 181.)

And if the wife recover a judgment whilst *sole*, and after marriage the husband and wife sue out a *scire facias*, and have judgment and award of execution thereon, but before execution executed the wife die, the surviving husband is entitled to an action of debt, or a new *scire facias* thereupon, because the award of judgment and execution on the *scire facias* alters the property, and vests it in the husband. So, if pending an action by husband and wife, the wife die, the suit abates; but if they *obtain judgment*, he may, notwithstanding her subsequent death, issue an execution, or support an action of debt on such judgment. (1 Bl. Com. 443, n (44); Woodyer v. Gresham, 1 Salk. 116.)

But for the *choses in action* of the wife, including all contracts made with her before marriage, and all bonds and notes payable to her, or to her and him, made *during coverture*, on which he has not elected to sue in his own name, the husband surviving can only maintain an action *as her administrator*, which, in the absence of any agreement to the contrary, he is always entitled to be, and also, after payment of her *ante-nuptial* debts, to be her *sole distributee*. (1 Bl. Com. 443, n (44); Toll. Ex'ors, 85, 116; Philliskirk v. Pluckwell, 2 M. & S. 396, n (b); V. C. 1873, c. 126, § 4; Id. c. 119, § 10 (cl. 3); Templeman v. Fauntleroy, 3 Rand. 434; Wade v. Boxley, 5 Leigh, 442; Thornton v. Winston, 4 Leigh, 158, 162.)

It should be observed that, in England, by Statute 32 Hen. VIII, c. 37, § 3, it is provided that



“husbands seised in right of their wives, in fee-tail or for life, of any rents or fee-farms, may distrain after the death of their wives, for arrears due in their life time,”—which was interpreted (in conjunction with another provision of the same statute), to allow the husband surviving to recover either *by action or distress* all arrears of rents on the wife’s ante-nuptial leases of her *free-hold* lands, whether accruing *before or during* the coverture. That statute, however, although long a part of our Code, was pretermitted at the revisal of 1849, so that the common law is supposed to be restored, whereby the husband can recover *only* the arrears accruing *during coverture*. (3 Th. Co. Lit. 255, & n (D); Id. 259; 1 Lom. Ex. 519.)

2\*. Who should sue *when the Wife Survives*.

The surviving wife may sue in respect of all *chatels real* which her husband had in her right, and did not dispose of during coverture. So also she may sue for arrears of rent which became due *before the coverture*, upon any ante-nuptial lease by her of her lands, whether freehold or leasehold; for arrears of rent which became due *during coverture*, for her leasehold (and perhaps her *freehold*) lands, where the rent is reserved to the *husband and wife* (the rent being due in respect to her *joint interest*, which by the reservation is acknowledged as continuing); for arrears of rent falling due *after the coverture ended*, upon ante-nuptial leases of her lands, whether freehold or leasehold; or upon leases of her leaseholds made during marriage, when she, after the husband’s death, elects to *confirm them*; for all *choses in action* to which she was entitled *at the time of the marriage*, and which the husband did not reduce into possession; for all *choses in action* to which she became entitled *during the coverture*, and which her husband did not reduce into possession; for all *torts* committed on her person or property before marriage, or on her person during marriage, for which no redress was obtained by her husband; and, lastly, for all rights of action accruing to her in *auter droit*, as executrix, &c., even against the husband’s personal representative, her right of action being at common law only suspended during coverture. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 36; 1 Bright’s H. & Wife, 43 & seq.; 1 Lom. Ex’ors. 518-19; Parry v. Hindle, 2 Taunt. 181;

Philliskirk v. Pluckwell, 2 M. & S. 396, & n (b); Howell v. Maine, 3 Lev. 403.)

The correct rule as to the survivorship of *choses in action* to the surviving wife, in case of contracts made with her during the coverture, is said to be this: Wherever the action is on an *express contract with the wife*, or with the *husband and wife*, the *wife may be joined* unless the consideration averred in the pleadings, or shown in the proof at the trial, be one in which the wife cannot be intended to have an interest; and in every such case, if the interest of the wife *be not disaffirmed by the husband*, by the appropriation of the cause of action to his sole use, by suing in his own name, the wife surviving *will be entitled* to it. (May v. Boisseau, 12 Leigh, 520; Philliskirk & ux v. Pluckwell, 2 M. & S. 393; Richards v. Richards, 2 B. & Ad. (22 E. C. L.) 447; Wells v. Nurse, 1 Ad. & El. (28 E. C. L.) 40.)

6<sup>1</sup>. Consequences of making a *Mistake in the proper Parties Plaintiff*.

Where a married woman ought to have joined her husband with her, but *sues alone*; or where she marries after the suit is commenced, and before plea, the *defendant* can take the objection that she is a *feme covert* only by *plea in abatement*, and not by *plea in bar*, although the *husband* may sustain a *writ of error*. But when a *feme covert* improperly sues alone, having *no legal right of action whatever*, she will fail at the trial. And if she be improperly joined with her husband in an action, when he ought to sue alone, the defendant, if the objection appears on the face of the declaration, may demur, move in arrest of judgment, or reverse the judgment upon a writ of error; or if the objection does not appear on the face of the pleadings, the plaintiff will still be defeated at the trial, upon proving the facts. If, on the other hand, the husband sue alone, when the wife ought to be joined, either in her own right, or in *auter droit*, as executrix, &c., he will fail at the trial; or if the objection appear on the record, it will be fatal on demurrer, in arrest of judgment, or on writ of error. (1 Chit. Pl. 36-'7, 86; Yard v. Ellard, 1 Salk. 119; S. C. 1 Ld. Raym. 368; Bidgood v. Way, 2 W. Bl. 1239.)

2<sup>h</sup>. *Actions against Husband and Wife*.

The analysis of this branch of the enquiry will be the same as under the first head. Thus, it is proposed to consider, (1), Cases where *husband and wife must*

*be joined*; (2), Cases where *husband must sue alone*; (3), Cases where the husband and wife *may be jointly sued or not*, at the election of the plaintiff; (4), Cases where *the wife may be sued alone* in courts of law; and (5), Who is to be sued *in case of death of the husband or wife*;

W. C.

1<sup>1</sup>. Cases where *Husband and Wife must be joined*.

In general, a married woman cannot be sued in a court of law without her husband. They must, for the most part, be *sued jointly* for all causes of action, whether of contract or of tort, subsisting against the wife *at the time of the marriage*; also for all torts committed by her *during the coverture*; and for all causes of action against the wife as *executrix or administratrix*, arising out of a personal contract of her decedent. Hence, when a *feme sole* enters into *any contract* (e. g., a bond, promissory note, or other agreement), or commits *any tort* (such as assault, slander, &c.), and then marries, suit during the coverture must be brought against the husband and herself jointly; although where the husband, in respect of some *new consideration*, as forbearance, &c., expressly promises to perform the wife's *ante-nuptial* contracts, he may be sued alone on such an undertaking, or he and his wife may be sued jointly on the original demand. Hence, also, if the wife commits torts during the coverture, as by slander, libel, assault, &c., she and her husband must be joined in the action, as also for any forfeiture under a penal statute. It should be observed, however, that although both must be sued for *her tort*, it is not allowable to sue both as for a tort *committed by both*, unless it is really capable of being so committed. Thus, slander by *husband and wife* is impossible. *He* must be sued separately for the slander of which *he* is guilty, and both for *her's*. But they may unite in an assault and battery, or even in enticing away and harboring the servant of another, and therefore for those injuries a joint action lies against both. To this general doctrine, however, are these qualifications—namely: That the action of *detinue* cannot be supported but against the husband alone as long as the coverture lasts; and that for a *conversion* of chattels, alleged to be made by the husband and wife, the action of *trover* should in strictness be brought *against him only*, or at least that the conversion should not be alleged to have been *to their use*, but

to the *husband's use only*, although the objection is cured by the verdict. (1 Bl Com 443, n. (44); 1 Chit. Pl. 66; Bac. Abr. Bar. & F. (L); Draper v. Fulkes, Yelv. 165, & n. (1); Wilbraham v. Snow, 2 Saund. 47, l & m; Fawcett v. Beavres & ux, 2 Lev 63; Marshall v. Rutton, 8 T. R, 545; Roadcap & ux v. Sipe, 6 Grat. 213.)

2<sup>1</sup>. Cases where *Husband must be Sued Alone*.

The husband must in all cases be sued alone, where the wife cannot be considered as, *in person or property, giving rise to the cause of action*. Hence the wife is never to be joined with the husband in an action upon a personal contract made by her during coverture, as upon a promise to pay money, or to do any other thing alleged to be made jointly with him, because *her promise, as to herself, is void*. If, in fact, the promise was *joint*, yet he alone is bound by it, and he only is to be sued; and if made by her alone, it is never binding on her; so that if it be of any avail at all, it is in consequence of her being the *agent of her husband*, or of some one else. But although it is improper to join her with her husband for the reason just stated, and although at common law to do so exposes the plaintiff to fail, by reason of the variance between the contract alleged and that proved, yet by statute in Virginia the mistake is effectually cured, wherever there might have been a recovery against the husband, had he been sued separately; that is, whilst the wife is discharged, the verdict and judgment go against the husband, as if he alone had been sued. (V. C. 1873, c. 173, § 19; Steptoe v. Read, 19 Grat. 10; Moffett v. Bickle, 21 Grat. 285, &c.) Neither can husband and wife be sued jointly *for any tort*, unless it be one which they may unite in committing. Thus, they cannot be sued jointly for *slander by both*, for slander cannot be jointly committed; but for the slander *by him* he must be sued alone, as we have seen; whilst for her's they have to be joined. (Bac. Abr. Bar. & F. (L); Swithin & ux v. Vincent & ux, 2 Wils. 227.) There are, however, two cases where, at the first glance, the wife appears to give rise to the cause of action, and where yet she must not be joined; because the injury sought to be redressed is, *in law*, done by the husband alone. These cases are the action of *detinue* for a chattel which, after the marriage, is withheld *by husband and wife*; and the action of *trover* for the alleged conversion of a chattel *by them both*, the de-

tainer and conversion being, *in law*, the detainer and conversion *by him alone*. But if they were joined, the objection, at least in the case of *trover*, would be cured, it seems, by verdict. (1 Bl. Com. 443, n. (44); Bac. Abr. Detinue; Id. Bar. & F. (L); Berry & ux v. Nevie, 3 Cro. (Jac.) 661; Marshall v. Rutton, 8 T. R. 545; Wilbraham v. Snow, 2 Saund. 471, &c.; Draper v. Fulkes, Yelv. 166 a. & n. (1); Keyworth v. Hill & ux, 3 B. & Aid. (5 E. C. L.) 685 & note; Roadcap & ux v. Sipe, 6 Grat. 213; Williamson v. Paxton, 15 Grat. 459.)

3<sup>d</sup>. Cases where the Husband and Wife *may be Jointly Sued*, or the Husband Sued alone, at the election of Plaintiff.

Although husband and wife *must be joined*, as we have seen, in an action on the wife's contract made before marriage, yet if the husband, upon a *new consideration*, such as forbearance, &c., expressly undertake to pay the debt, or perform the contract of the wife, he may be *sued alone* on such undertaking, or (except where the original promise is merged in that of the husband), husband and wife *may be joined*. (Mitchinson v. Hewson, 7 T. R. 345; Drue v. Thorn, Allyn, 36.) And when rent becomes due, or any liability arises *during coverture*, out of a lease made to the wife *whilst sole*, the action may be *against both*, by reason of the original contract; or it may be *against the husband alone* by reason of his being the occupant of the premises and a *quasi assignee*. (Lake v. Smith, 1 Bos. & Pul. (N. R.) 177.) So, also, where the lease is made during coverture to the *husband and wife jointly*, an action for rent or other liability arising out of the lease may be *against the husband alone*, because directly the promise and obligation are his; or *against the husband and wife jointly*, because *prima facie* the lease is beneficial to her, and is obligatory upon her unless her husband, immediately upon becoming aware of it, shall disclaim it in her behalf, or she, upon becoming *discovert*, shall disclaim it for herself. (Bac. Abr. Bar. & F. (L).) We have seen that in those cases where, in point of fact, husband and wife can concur *in committing a tort* (*e. g.* an assault and battery, or enticing away another's servant, &c.,) they may be *sued jointly* for such wrong, but the husband may also in such case be *sued alone*; and if they are *sued together* the acquittal of the husband for his alleged participation will not preclude the plaintiff from re-

covering for the act of the wife. (1 Bl. Com. 443, n (44); *Fawcet v. Beavres & ux*, 2 Lev. 63; *Keyworth v. Hill & ux*, 3 B. & Ald. (5 E. C. L.) 685.)

4<sup>1</sup>. Cases where the *Wife may be Sued alone in the Courts of Law*.

The wife may be sued *alone*, without her husband, under circumstances corresponding to those which warrant her in *suing without him*; for which see *ante*, p. 337, 1<sup>1</sup>.

5<sup>1</sup>. Against whom Suit is to be instituted *in case of the death of the Husband or the Wife, respectively*; W. C.

1<sup>k</sup>. Who is to be Sued *where the Husband survives*.

The husband, surviving the wife, may be sued for arrears of rent, accruing *during the coverture*, upon a lease made to the wife whilst sole, because he either did enjoy, or might have enjoyed, the premises. And so, also, he may be sued for money due upon a judgment recovered against husband and wife during coverture. But he is not liable to be sued in the character of *husband merely*, for any contract or for any tort of the wife made or done *before coverture*, where no judgment has been obtained against them jointly *during coverture*; and if such joint suit be instituted, but she die before judgment, the suit must abate. However, although in such cases he is not liable *as husband*, he may yet be so as his *wife's administrator*. If there be any *choses in action* of the wife, not reduced into possession during coverture, he can recover them, as we have seen, not by virtue of any direct marital right, but only in the capacity of her administrator; and, having recovered them in that character, he must pay, as far as such assets extend, all lawful claims against his wife, including whatever may be due upon her ante-nuptial promises and contracts, and also by reason of her ante-nuptial torts as by law (V. C. 1873, c. 226, § 20, 21; *Id.* c. 145, § 7, & seq.) survive against a personal representative. As to torts committed *by the wife* while the coverture lasts, it seems the surviving husband continues to be liable therefor. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 66, 106; *Head v. Stamford*, Cas. Temp. Talbot, 174; S. C. 3 P. Wms. 411; *Reeve's Dom. Rel.* 72; *Rigley v. Lee & ux*, 3 Cro. (Jac.) 356; *Anon.* 4 Cro. (Car.) 509; *Middleton v. Croft*, Temp. Hardwicke, 399.)

2<sup>k</sup>. Who is to be Sued *when the Wife survives*.

Where the wife survives the husband, or outlives

the coverture (in consequence of a divorce *a vinculo*), she may be sued upon all her unsatisfied ante-nuptial *contracts*, and also for her ante-nuptial *torts*, and *torts* committed *by her* during coverture, for which satisfaction has not been previously obtained. But the certificate in bankruptcy of the husband will discharge *her* from all debts and other claims against *her* which could have been *proved against him* in bankruptcy. (1 Bl. Com. 443, n (44); 1 Chit. Pl. 67-'8, 106; *Mitchinson v. Hewson*, 7 T. R. 350; *Woodman v. Chapman*, 1 Campb. 189; *James' Bankrupt Law*, 87.)

6<sup>1</sup>. Consequences of a Mistake in the Proper Parties Defendant.

Where the husband is *sued alone* upon the contract or tort of his wife *before coverture*, and the objection appear on the *face of the declaration*, the defendant may demur, move in arrest of judgment, or have a writ of error to reverse the judgment in an appellate court. If the cause of action be *misdescribed* as being that of the husband, the plaintiff will fail at the trial upon the general issue, upon the ground of a *variance* between the cause of action stated in the declaration, and that proved.

If husband and wife be improperly joined on contracts after marriage, or for torts of which they could not, in law, be *jointly guilty*, as for slander *by both*, and the objection appears on the face of the declaration, the defendant may demur, move in arrest of judgment, or have a writ of error. If the objection does not appear in the pleadings, the plaintiff will fail at the trial, at common law, it is said, upon the general issue, on the ground of a variance. But in Virginia it is provided by statute, that in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants, against whom he would have been entitled to recover if he had *sued them only* (V. C. 1873, c. 179, § 19); and consequently it seems that the plaintiff would be entitled to recover against the husband, though he should fail against the wife. (*Steptoe v. Read*, 19 Grat. 10; *Moffett v. Bickle*, 21 Grat. 285, &c.)

And where the wife is sued alone upon her ante-nuptial contract, or for her tort, committed either before marriage or after it, she must plead her coverture *in abatement*, and cannot otherwise avail her-



self of it (although the husband, it seems, may avoid the judgment by writ of error, *coram vobis*. (Bac. Abr. Bar. & F. (L); Id. Errors & Abatem't; Milner v. Milner, 3 T. R. 631.) And if she marry pending an action against her, it does not abate, but the plaintiff may proceed to execution without noticing the husband. But if a *feme covert* be sued upon her supposed contract, *made during coverture*, such contract being wholly void, she may plead the coverture *in bar*, or may give it in evidence, under the general issue of *nil debet, non assumpsit*, or if it be by deed, of *non est factum*. (1 Chit. Pl. 168, 106; Dyer, 19 a, & note; Yates v Boen, 2 Stra 1104, & n (1); King & ux v. Jones, 2 Stra. 811; Swithin v. Vincent & ux, 2 Wils. 227; Milner v. Milner, 3 T. R. 627; Mitchinson v. Hewson, 7 T. R. 348.)

3<sup>d</sup>. Suits as between *Husband and Wife*, or *by or against the Wife alone*, in the Courts of Equity.

In the civil or Roman law, the husband and wife are considered not as one, but as two distinct persons, and may have separate estates, contracts, debts, interests, and injuries. Hence, in those courts in England which have adopted, to a great extent, the modes of proceeding of the civil law, and therewith many of its rules and analogies, a married woman may not only, in some cases, sue and be sued without her husband, but, when justice so requires, may *sue him* and *be sued by him*. So it is in the mother-country, in the ecclesiastical courts and courts of chancery. and so with us it is in the courts of chancery. (1 Bl. Com. 444, & n (47); Id. 20, 83; *Ante*, 37.)

Courts of chancery recognize in general the rule of law which considers husband and wife as one person, and their interests as the same; and in equity, therefore, as at law, where a suit respects her rights, it is to be for the most part instituted by or against them *jointly*; but in equity, this doctrine is kept in subordination to the requirements of justice and of social convenience. Thus, if a married woman claims some right in opposition to her husband, such as alimony, in consequence of his cruelty, or the specific enforcement of marriage articles, as he is the party to be complained of, the complaint, of course, cannot be made in his name. For the husband and wife to join in preferring a demand against the husband would savor of absurdity. In such case, therefore, as the wife, being under the disability of coverture, cannot, without anomaly and some practical inconvenience,



sue alone, and yet cannot sue under the protection of her husband, she must seek temporarily some other aid, and the bill in equity is allowed to be exhibited in her name (of course with her consent) by her *next friend* (or *prochein ami*), who is to be named in the bill. (1 Bl. Com. 444, n (47); Mitf. Eq. Pl. 27-'8; Fonbl. Eq. 95, n (k); 2 Stor. Eq., § 1367-'8; Griffith v. Hood, 2 Ves. Sen'r, 452; Watkyns v. Watkyns, 2 Atk. 96; Sidney v. Sidney, 3 P. Wms. 269; Blount v. Winter, 3 P. Wms. 276, note (2); Lampert v. Lampert, 1 Ves. Jun'r, 21; Arundell v. Phipps & al, 10 Ves. 144, 149; Seagrave v. Seagrave, 13 Ves. 442.)

In like manner, a married woman may, upon occasion, defend a suit in equity separately from her husband, and by leave of court she may do so without the protection of another. Thus, if she claims in opposition to him, or if she live separate from him, or disapproves the defence he wishes her to make, she may obtain an order giving her leave to defend separately; although, in general, her separate answer, without a previous order, is to be suppressed as irregularly filed. And yet when the husband, being plaintiff in a suit, makes his wife a defendant, and treats her as a *feme sole*, she may answer separately without an order. So, where a married woman obstinately refuses to join in defence with her husband, she may be compelled to make a separate defence, and for that purpose process may be ordered to issue against her separately. (Mitf. Eq. Pl. 95-'6; 1 Bl. Com. 444, n (47); Moore v. Moore, 1 Atk. 272.)

But still it seems that a wife cannot sue or be sued in equity *à la stranger*, without her husband being plaintiff or defendant, even in respect to her separate property, except in those cases where she may be sued separately *à la*; or except where the husband is not within the jurisdiction of the court, and she is called on to make good engagements which she has entered into touching such separate property. And in the latter case, the most the court can do is to call forth her separate property in the hands of her trustees, and to direct the application of it; for no personal decree is admissible in such case, against a *feme covert*, for the payment of a debt. (1 Bl. Com. 444, n (47); Fonbl. Eq. 195, n (v); 2 Stor. Eq. § 1368; Th. Co. Lit. 134 & seq. 136-7, n's P, Q and R; Marshall v. Barton, 5 T. R. 345; Norton v. Trevill, 2 P. Wms. 144; Deane v. H. & al, 2 Vern. 613 & n

(1); *Hulme v. Tenant* (1 Bro. C. C. 16), 1 Wh. & Tud. L. C. 355).

5<sup>g</sup>. Doctrine touching Liability of *Married Women to punishment for crime*; W. C.

1<sup>h</sup>. Wife's Responsibility for Crimes committed *in the Husband's Presence*.

In general the wife is not punishable for crimes committed in the husband's presence, because she is supposed to act *under his coercion*. But to this doctrine there are two classes of exceptions, namely:

(1). The crimes of *treason, felonious homicide, and robbery*; because of the heinousness of the offence, and the necessity of protecting society to the utmost against their commission; and

(2). The offence of *keeping a brothel*; because, says Blackstone, it touches the domestic economy or government of the house in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex.

A disposition, however, has been manifested by our courts to recede from this doctrine in its common law latitude, it being held in Virginia, that although, with the foregoing exceptions, there is a presumption of the husband's coercion in respect to any crime which is committed by the wife *in his presence*, yet it is only a *prima facie* presumption, and may in any case be repelled by showing that she acted from her own free and uncontrolled will. (1 Bl. Com. 444, & n (48); 4 do. 28-'9; Bac. Abr. Bar. & F. (G); 1 Russ. Cr. 15, 16; Synops. Crim. Law, 11, 12; Uhl's case, 6 Grat. 706.)

2<sup>h</sup>. Wife's Responsibility for Crimes committed by her *not in her Husband's Presence*.

For offences committed by the wife *not in the husband's presence*, whether they be felonies or misdemeanors, she is no less amenable to punishment than if she were unmarried; save only that if the offence be *punishable by fine*, the husband must be joined with her in the prosecution, because upon conviction *he must pay the fine*. But whatever corporal punishment is inflicted, *she must suffer alone*. (4 Bl. Com. 29; 1 Russ. Cr. 17; Bac. Bar. & F. (G).)

3<sup>h</sup>. Wife as *Accessory to Husband's Crime*.

The wife may be *accessory before the fact* to the crime of her husband, by persuading or advising him to commit it. But she cannot be accessory *after the fact* by receiving him, the law in that instance recog-

nizing her domestic allegiance and the impulses of conjugal affection to be paramount to her social duty. (1 Russ. Cr. 16, 19; 1 Hale, P. C. 516, 47; Bac. Abr. Bar. & F. (G).) And this principle is now with us confirmed by statute. (V. C. 1873, c. 195, § 8.)

4<sup>h</sup>. Wife's Committing Offences *against Husband's Property.*

A wife cannot be guilty of *any offence* against the property of her husband; for husband and wife are *one person* in law, and at marriage he endowed her with such an interest in his property as that she can commit no offence against it. Even a stranger who takes the husband's goods with the wife's privity, is not guilty of larceny, unless he were her *paramour*. (1 Russ. Cr. 19; Bac. Abr. Bar. & F. (G).)

6<sup>s</sup>. Doctrine touching Husband and Wife *being witnesses, the one for or against the other.*

In no cause, civil or criminal, are husband and wife allowed to be evidence for or against each other; and that not so much because it is impossible their testimony should be fair and impartial, nor because of the union of person and interests subsisting between them, as because of considerations of public policy lying at the basis of society. For it is essential to domestic happiness that the confidence which ought to be maintained between husband and wife should be sedulously cherished, and as far as possible be preserved unimpaired. Hence neither consort is competent to testify to what was derived through the medium of the confidence which the conjugal relation inspires, even after such relation is *terminated* by death; and hence, also,—whilst of late the restraints which wisely forbade, in tenderness to human frailty, that one should be a witness for or against himself, have been in civil cases almost wholly withdrawn,—the incapacity of husband and wife to testify for or against each other remains unchanged; nor can any *consent*, founded as the rule is on public policy, authorize the breach of it. (1 Bl. Com. 443, 444, n (46); 1 Greenleaf's Evid. § 334, 337; 2 Kent's Com. 178-'9; V. C. 1873, c. 172, § 22.)

But where the offence is directly against the person of the wife (or doubtless of either consort), this rule has been usually dispensed with. If the husband commits, or is accessory to the commission, of any crime of violence against the wife, or, as is supposed, the wife against the husband, the injured consort is not prohibited to testify against the aggressor, in order to obtain the protection of the law by surety of the peace,

or to procure punishment to be inflicted. Thus a woman is a competent witness against a man indicted for forcibly abducting and marrying her, if the force were continuing until the marriage—of which fact she is also a competent witness; and this, according to the better opinion, notwithstanding her subsequent assent and voluntary cohabitation; for otherwise the offender would profit by his own wrong. So, also, the wife is a competent witness against her husband on an indictment for a rape committed by his procurement upon her person, as in Lord Audley's (or Castlehaven's) case; or for an assault and battery, or other violence, committed upon her. And her dying declarations, in case of her homicide, are admitted against him like those of a stranger. (1 Bl. Com. 443-'4, n (46); 1 Greenl. Evid. § 343, 346; 1 East. P. C. 357.)

It can scarcely be needful to observe that this rule does not operate to exclude declarations and admissions made by the wife *as agent* of the husband. These when made in the progress of the transaction, are admissible as the declarations and admissions of any other agent, partly by virtue of the authority conferred by the agency, and partly because such statements are part of the *res gestæ*, that is, of the transaction itself. (1 Bl. Com. 444, n (46); 2 Kent's Com. 179-'80; 1 Greenl. Evid. § 185.)

3<sup>d</sup>. Contrast of the Sexes, in *respect to their several Rights and Privileges*.

Blackstone concludes his dissertation upon the law of husband and wife by remarking that even the *disabilities* imposed on the wife are for the most part intended for her protection and benefit. "So great a favorite," he complacently observes, "is the female sex of the laws of England!" (1 Bl. Com. 445.)

This sentiment of the learned and too eulogistic commentator gives occasion to an indignant protest by Mr. Christian, who, in a note to the passage in question, has given a brief, but admirable summary of the principal differences in the English law respecting the two sexes. (1 Bl. Com. 445.)

W. C.

1<sup>st</sup>. Differences in respect of Crimes; W. C.

1<sup>a</sup>. Difference in respect of *Homicide of Husband by Wife, and of Wife by Husband*.

Husband and wife, in the language of the law, are styled *baron and feme*, which word *baron* (or lord), says Mr. Christian, "ascribes to the husband not a very courteous superiority. This, however, might be

deemed merely an unmeaning *technical* phrase" (albeit the phrase and its application are *taken from the Scriptures*.—1 Pet. iii. 5, 6). "if we did not recollect that, at common law, if the *baron* kills his *feme*, it is the same as if he had killed any other person; but if the *feme* kills her *baron*, it is denominated a species of treason (*petit treason*), and the law condemns her to the same punishment as if she had killed the King. And for every species of treason (though in *petit treason* the punishment of men was only to be drawn on a hurdle to the place of execution and *hanged*), till 30 Geo. III, c. 45 (A. D. 1790), the sentence of women was to be drawn and *burnt alive*. (1 Bl. Com. 445, n (49); 4 do. 204, & n (44).)

This distinction in Virginia is done away with, it being declared by statute that there shall be no "distinction between murder and *petit treason*; but the last mentioned offence shall be punished as murder." (V. C. 1873, c. 195, § 4.) And not only are all cruel and unusual punishments prohibited by our Constitution (Va. Const. Art. I, § 11), but the death penalty is by statute required to be inflicted always *by hanging*. (V. C. 1873, c. 203, § 9.)

2<sup>h</sup>. Difference in respect to the allowance of the *Benefit of Clergy* to the two sexes, respectively.

The *benefit of clergy* had its origin in the pious regard paid by Christian princes to the primitive Church. It was an exemption from punishment even for heinous crimes, allowed by civil governments to persons in holy orders, out of an exaggerated reverence for the professed ministers of God, which the clergy, when increased in numbers, wealth, and power, claimed as an inherent right *jure divino*, and in some countries had their claim allowed although never in England to the extent of total exemption. Originally, no one was admitted to the privilege of clergy unless he was actually a priest in orders; but in that period of universal ignorance, the ability to read was a mark of such learning as it was supposed could belong only to a clergyman, and was received as sufficient evidence of the clerical character, entitling the individual who possessed the power to exemption from punishment, in the civil courts, for the *less heinous capital crimes*. Many changes were made in the doctrine from time to time by statute, all tending, under cover of the *benefit of clergy*, to mitigate the severity of the penal code by substituting for the death penalty, in the lower capital felonies, such as manslaughter, bigamy,

larceny, &c., in the case of persons not previously convicted of like offences, the milder punishment of burning in the hand, imprisonment, transportation, &c. This leniency was not at first extended to persons who, by no presumption, could be supposed to possess a clerical character, and therefore it was not enjoyed *by women*. But in process of time, the benefit of clergy was allowed without regard to the clerical profession of the culprit, and by Statute 3 & 4 W. & M. c. 9, and 4 & 5 W. & M. (A. D. 1692, 1694), *without regard to sex*; and finally, by 7 & 8 Geo. IV, c. 28 (A. D. 1828), it was abolished. But by the common law, and for many ages, the distinction of sex was so much regarded, that all women were denied the benefit of clergy; and until the Statutes of 3 & 4 W. & M. and 4 & 5 W. & M., above named, they received sentence of death, and might have been executed, for the first offence, in the clergyable crimes of simple larceny, bigamy, manslaughter, &c., however learned they were, because their sex precluded the possibility of their taking holy orders; though a man *who could read* was for the same crime subjected only to burning in the hand, &c.; and if *a peer*, to no other penalty but the disgrace of conviction. (1 Bl. Com. 445, n (49); 4 do. 365 & seq.; 4 Steph. Com. 121.)

In Virginia the earliest colonial statute upon the subject was in 1732 (4 Hen. Stats. 325-'6), whereby the distinction of sex was abolished, the faculty of *reading* dispensed with, and the legislation of England upon the subject, *prior* to 4 Jac I, was adopted. On the establishment of the penitentiary system in 1796, and the consequent restriction of capital punishment in regard to *free persons* to a few of the more atrocious felonies,—the less heinous crimes of that grade being punished by confinement in the penitentiary for various terms, graduated to the guilt and mischievousness of the offence,—there was no longer occasion, as to free persons, for the device of *benefit of clergy*, which as to them was accordingly abolished. In the case of *slaves*, however, to whose situation penitentiary punishment was supposed to be not adapted, the benefit of clergy was retained for half a century longer, having been finally abolished by act of 1847-'8. Our present statutes provide (V. C. 1873, c. 195, § 4) that "there shall be *no benefit of clergy*." See 1 R. C. (1819) c. 171, § 10; Acts 1847-'8, p. 124, c. 120.

2<sup>d</sup>. Differences between the Sexes *in respect to Civil Rights*;  
W. C.

1<sup>h</sup>. The disposition of Intestate Property as *between the Sexes*.

Intestate *personal* property in England, is equally divided between males and females; but a son, though younger than any of his sisters, is *sole heir* to the whole of the realty. (1 Bl. Com. 445, n (49).)

In Virginia both classes of property as to which decedent is intestate, pass without discrimination to, and are equally divided amongst, males and females, save only that, in the ascending line, the father is preferred to the mother, &c., the grandfather to the grandmother, &c. (V. C. 1873, c. 119, § 1, 10.)

2<sup>h</sup>. The Rights of *Husband and Wife*, respectively, in *each other's Chattels*.

A woman's personal property becomes by marriage, or may become in consequence of the reduction of it into possession *during coverture*, absolutely the husband's, and at his death he may leave it entirely away from her; but in England, if he die without will, she is entitled to *one-third* of his personal property if he has children, otherwise to *one-half*. (1 Bl. Com. 445, n (49).)

In Virginia the doctrine is the same as to the husband's title to the wife's chattels, as above described. As to the wife's interest in the husband's personalty, however, our law is considerably more favorable to her than that of England. If the husband die intestate, leaving a widow, and issue *by her*, the widow shall be entitled to one-third of the surplus of his personalty, remaining after payment of debts and expenses of administration. If there be *no issue by her*, she is entitled absolutely to such of the personalty acquired by the husband, in virtue of his marriage with her, as shall remain *in kind* (that is, unchanged in form) at his death, after payment of his debts and the expenses of his administration (so far only as the other personal estate of the husband may be insufficient for the satisfaction thereof); she shall also be entitled, if the husband leave issue by a former marriage, to *one-third*; if no such issue, to *one-half* of such surplus. And of this distributive share of his personalty, the widow cannot be deprived without her consent, by her *husband's will*, although she may be by an *irrevocable* disposition made in his life-time, even if not to take effect until after his death, and although designed to defeat her claim as distributee. (V. C. 1873, c. 119, § 10, 12; Lightfoot's Ex'or v. Colgin, 5 Munf.



42; *Gentry v. Bailey*, 8 Grat. 594; *Ante*, 299, & seq., 313, & seq.)

3<sup>d</sup>. The Rights of *Husband and Wife, respectively, in each other's Lands.*

By the marriage the husband, at common law, becomes absolutely master of the profits of the wife's *freehold lands* during the coverture; and if he has by her a living child born during the coverture, and he survives the wife, he retains during his life the whole of the lands belonging to her, of which she was seised at any time during the coverture, of an estate of inheritance, such that the issue of the marriage may *inherit it as heir to the wife*; an interest which is denominated his estate *by the curtesy*. But in a corresponding estate of inheritance of the husband, the wife, if she survives, is entitled for her life only to *one third* (her *dower*); but this whether there was any child of the marriage or not. (1 Bl. Com. 445, n (49); 2 Insts. Com. & Stat. Law, ch. VIII.

The doctrine in Virginia is the same, except that the widow is by statute with us entitled to *dower* (as even at common law the husband might have had *curtesy*) in *equitable* as well as in *legal* estates of inheritance, and even in *rights of entry or of action*. (V. C. 1873, c. 106, § 1, 2; Id. c. 112, § 17; 2 Insts. Com. & Stat. Law, ch. VIII; *Ante*, 311 & seq.; 315 & seq.)

4<sup>d</sup>. The Liability of the Sexes respectively, to *Taxation, without Representation.*

The property of women is taxed without representation—that is, without the privilege of voting for representatives who impose the taxes. (1 Bl. Com. 445, n (49).)

The same proposition holds good in Virginia, and it would probably be very detrimental to the public weal were it otherwise. The power to influence the suffrage of others is even more valuable than the possession of the right of suffrage oneself; and that silent and pervasive influence which, in Anglo Saxon communities, is wielded now by women with prodigious effect, going far to mould, whilst it moderates, the opinions and action of society upon all questions of enduring significance, is a mightier agency than the sex would possess in the ballot. Women cannot be injured by any legislation, but especially not by taxation, without inflicting a corresponding wrong on their fathers, husbands, brothers and sons, whose votes will afford their interests all the protection they need; so



that there seems no adequate reason for unsexing them, filling their breasts with the fires of contending factions, in which they are prone to indulge, when they enter into them at all, with more rancorous and unreflecting violence than men, and thus vexing society with unceasing bitterness and strife, from which not even the sacred precincts of home would be free. Woman's sphere of duty and happiness is far removed from such contentions, in which she could not engage without disastrous results to her proper influence and character. It must be remembered also that, as mingling in the contests of the hustings would be peculiarly repugnant to women of education and refinement, the function of voting would devolve chiefly upon the classes least fitted to exercise it with discretion, and most likely to abuse its opportunities. If *men* of culture retire from the strife of a canvass with disgust, unpatriotically leaving the highest interests of the body politic to be controlled too largely by the designing, the corrupt, and the ignorant, the wives, sisters and daughters of these delicate citizens could hardly be expected to lay aside the instincts of their sex, as well as the sentiments and tastes engendered by their social relations, and soil their woman's robes of purity with the mire of election contests.

5<sup>b</sup>. The Protection afforded by Law to the *Chastity of Women*.

The chastity of women is by the law sedulously guarded against violence, but it may be thought that a less adequate protection is afforded against the arts of the seducer. Thus, a parent can have no reparation in damages from the betrayer of his daughter's virtue, but by alleging that she is his *servant*, and that by the consequences of the seduction he is put to charge and expense, or is deprived of the benefit of her services, or where the seducer is at the same time a trespasser upon the premises of the parent. It is true, however, that when by such forced circumstances the law is enabled to take cognizance of the wrong, juries disregard the pretended injury, and give damages commensurate, as far as damages can be commensurate, to the wound inflicted on the parent's feelings and the dishonor attendant upon the injury. (1 Bl. Com. 445, n (49); *Edmundson v. Mitchell*, 2 T. R. 4, 5; *Irwin v. Dearman*, 11 East. 23; *Andrews v. Askey*, 8 Carr. & P. (34 E. C. L.) 7; *Sedgw. Dam.* 512, &c.)

The doctrine in Virginia, in respect to the *civil re-*

*dress*, is the same, except that it is provided by statute that "an action for seduction may be maintained without any allegation or proof of the *loss of the services* of the female by reason of the defendant's wrongful act" (V. C. 1873, c. 145, § 1), which, it will be observed, dispenses with the averment and proof of *acts of service*, but not of the *relation of master and servant*. (Lee v. Hodges, 13 Grat. 726; White v. Campbell, Id. 573.) But a much more material change in the *criminal aspects* of the subject is wrought by a yet more recent statute, whereby it is declared that to seduce and have illicit connexion with any unmarried female of previous chaste character, *under promise of marriage*, shall be a *felony*, punished by confinement in the penitentiary from *one to ten years*. (V. C. 1873, c. 187, § 16.)

6<sup>h</sup>. The protection afforded *by Law* to Female Reputation.

Mr. Christian complains vehemently that in England female virtue, by the *temporal* law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in *conversation* that the purest maid or the chastest matron is the most meretricious and incontinent of women, with impunity, or free from the animadversions of the temporal courts. Thus, female honor, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator. (1 Bl. Com. 445, n (49); 3 Do. 125.)

. This is certainly a very highly colored representation of the defect of the common law in the particular in question. It is true that words imputing to a woman a want of chastity are not, by that law, actionable *per se*,—that is, without alleging and proving special injury therefrom,—but unless special injury were proved, even though the words were actionable *per se*, the damages would be, in general, merely nominal. The disadvantage, therefore, of the words not being actionable *per se*, is less than at first sight would be supposed, and far less than is suggested by Mr. Christian's rhetorical statement. However, in Virginia the embarrassment, such as it is, is removed by a statute which declares that all words which, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace, shall be actionable; and no demurrer shall preclude a jury from passing thereon. (V. C. 1873, c. 145, § 2; Brooks v. Callaway, 12 Leigh. 466; Moseley v. Moss, 6 Grat. 534; Bourland v. Eidson, 8 Grat. 27.)

## CHAPTER XVI.

## OF PARENT AND CHILD.

3<sup>d</sup>. Relation of Parent and Child.

The next and most universal relation in society is that between *parent and child*.

Children are of two sorts, *legitimate* and spurious, or *bastards*, each of which will be considered in its order, and first of legitimate children. (1 Bl. Com. 446; 2 Steph. Com. 314; Reeve's Dom. Rel. 270 & seq.; Bac. Abr. Bastardy);  
W. C.

1<sup>o</sup>. Legitimate Children.

It is proposed to state, (1), The definition of a legitimate child; (2), The duties of parents to legitimate children; and (3), The powers of parents in respect to legitimate children.

1<sup>t</sup>. Definition of a *Legitimate Child*.

A legitimate child is defined at *common law* to be one that is born in *lawful wedlock*, or within a competent time after its termination, where there is no *impossibility* of procreation by the husband. (1 Bl. Com. 446; 2 Steph. Com. 314; Reeve's Dom. Rel. 270; Bac. Abr. Bastardy, (A).)

*Puter est quem nuptiæ demonstrant* is the rule of the civil or Roman law; and this holds with the civilians, whether the nuptials happen before or after the birth of the child. In England the rule is narrowed, for the nuptials must be *precedent* to the birth; of which more will be said in treating of bastards. (1 Bl. Com. 446.)

In Virginia such changes have been wrought by statute as materially to modify the definition. Having regard to those changes, we may define a legitimate child as one *born in wedlock*, whether *lawful or not* (where procreation by the husband is not *impossible*), or within a competent time after the coverture is determined; or if born out of wedlock, where the parents afterwards intermarry, and the father *recognizes the child*, either before or after the marriage. (V. C. 1873. c. 119. § 6, 7; Ash v. Way's Adm'r, 2 Grat. 203; Stones v. Keeling, 5 Call. 143; Watkins & ux v. Carlton, 10 Leigh. 560.)

2<sup>d</sup>. The Duties of Parents to Legitimate Children.

The duties of parents to their legitimate children range themselves under the heads following, namely: (1) Their maintenance; 2. Their protection; and (3) Their education;

W. C.

1<sup>st</sup>. The Duty of Maintenance of Legitimate Children.

The wants and the weakness of childhood render maintenance by some one other than the child himself indispensable, and the voice of nature indicates the parent as the fittest person to afford it. The duty of maintenance on the part of parents in respect to their *infant* children is, therefore, a principle of *natural law*, the right to which, on the part of such children, is insisted upon as a *perfect right* by the most eminent authorities, as, amongst others, by Puffendorf and Montesquieu. The latter very justly observes that the ordinance of marriage in civilized States is built, in part, on this natural obligation of the father to provide for his children; for marriage ascertains and makes known the person who is bound to fulfil the duty; whereas, in promiscuous and illicit conjunctions, the father is unknown, and the mother, besides being generally wanting in ability, finds a thousand obstacles in her way—shame, remorse, the constraint of her sex, and the rigor of social laws—that stifle her inclinations. (1 Bl. Com. 447; Puffend. Nat. Law, B. IV, c. xi, § 4; Montesq. Sp. Laws, B. XXIII, c. 2; 2 Kent's Com. 189; Reeve's Dom. Rel. 283.)

The municipal laws of all well regulated societies take care to enforce this duty; though Providence has done it more effectually by implanting in the heart of every parent that unquenchable affection which not even the deformity of person and mind, nor the wickedness, ingratitude, and rebellion of children can totally extinguish. (1 Bl. Com. 447.)

The civil or Roman law *obliges* the parent to provide maintenance for his offspring. Nay, it does not suffer him at his death to disinherit his child without expressly giving his reasons for so doing; and fourteen reasons are reckoned up which may justify such disinheritance. If the parent alleges no reason, or a bad or false one, the child may set the will aside, *tanquam testamentum inofficiosum*, a testament contrary to the natural duty of the parent. And it is remarkable under what color the children are to move for relief in such cases—namely, by suggesting that the parent had lost the *use of his reason* when he made the *inofficious* testament. And this, as Puffendorf observes, is not to bring into dispute the testator's power of disinheriting his own offspring for sufficient reasons, but to examine the motives upon which he did it; and if they are found defective in reason, then to set the testament aside. But this may well be considered as going too

far. Every man ought to have, by the laws of society, power to dispose of his own property; and, as Grotius very well distinguishes, *natural right* obliges a parent to give a *necessary* maintenance to children, at least during the period of infancy; but what is more than that, they can claim only by the favor of their parents, or the positive constitutions of the municipal law. (1 Bl. Com. 447-'8; Puffend. Nat. Law, B. IV, c. xi, § 7; Grot. de Jur. Bel. &c. B. II, c. 7, § 3.)

Let us next see what provision our own law has made for enforcing this natural duty. In England the limits of the obligation, and the manner of coercing its performance, are prescribed by sundry statutes, as 43 Eliz. c. 2, and others; and as these have not been enacted in Virginia, it has been gravely questioned by high authority (1 Tuck. Com. (B. I.) 126,) whether with us, governed as we are in this particular by the common law alone, there is any *perfect* legal obligation upon a parent to afford necessary maintenance to his *infant children*. In England the common law courts, after some fluctuations, seem to have settled down upon the doctrine that a parent is not obliged, independently of statute, to pay for necessities furnished an infant child, and that it is only by virtue of an actual or implied authority from him that he can be charged with anything, even necessities, supplied to such child. (1 Pars. Cont. 247 & seq. and notes; Mortimore v. Wright, 6 M. & W. 482; Shelton v. Springett, 11 Com. B (73 E. C. L.) 452.)

Looking at the question, however, in the light of common sense, it would seem that, as common law is common reason, and enforces in general all *definite* precepts of natural duty, as this is; as the parent (or at least the *father*), is entitled to *all the earnings* of his infant child; as provision is made by statute (V. C. 1873, c. 121, § 5,) to compel a putative father to support his *bastard children*, and also to pay the expenses of his infant child in the State lunatic asylum (V. C. 1872, c. 82, § 53); and as it has always been held in equity that a father, if of ability, is bound to maintain his minor children, even though they may have property of their own, the conclusion should be clearly in favor of the common law obligation of the father at least, to support his infant offspring; and so, according to Mr. Parsons (1 Pars. Cont. 251 & seq.), is the tenor of American authority; but certainly with an imposing array of dissent.

Whether a mother, who is not fully within these rea-

sons, is bound (if there be no father), to maintain her children whilst they are under age is more than doubtful; the weight of authority, both in England and the United States, being against her liability. (1 Pars. Cont. 256 & n (c); 2 Kent's Com. 191.)

In Virginia the doctrine is believed to be established that the common law holds the father at least, legally bound to supply *necessaries* to his infant child; and that he may therefore be charged with the contracts of such child for necessaries (as a husband may be on the contracts of his wife), on the score of *duty*, as well as on the score of *agency*. On the score of *duty* he is liable only for *strict necessaries* (not without reference, however, to the father's fortune and condition in society, or the condition which he has allowed his child to assume); and, moreover, for such necessaries as have not been supplied by the parent or from any other source. And the father cannot impair this liability, arising out of his duty, by any general notice or prohibition, although perhaps he may thereby preclude transactions with particular persons. But the liability ceases where the duty ceases, or is performed. On the score of *agency*, the liability may extend, of course, as far as the authority, whether express or implied, extends; and is capable of being terminated, as we have seen (*Ante* p. 223, 5°), other agencies are, by revocation, &c. (1 Bl. Com. 447; 2 Kent's Com. 191; 1 Pars. Cont. 253 & seq. and notes; Van Valkinburg v. Watson, 13 Johns. 480; Easley v. Craddock, 4 Rand. 423; Myers v. Wade, 6 Rand. 448; Evans v. Pearce, 15 Grat. 515; Penn v. Whitehead, 17 Grat. 503; Griffith v. Bird & als, 22 Grat. 80; Hughes v. Hughes, 1 Bro. C. C. 387, & note; Andrews v. Partington, 3 Bro. C. C. 60; Munday v. Howe, 4 Bro. C. C. 223; Hoste v. Pratt, 3 Ves. Jun'r, 733; Maberly v. Turton, 14 Ves. 499; Greenwell v. Greenwell, 5 Ves. 197, & notes.)

In England, they have two statutes designed to relieve the parish of the support of impotent persons who have near relatives able to take care of them, namely, the statutes of 43 Eliz. c. 2, and 5 Geo. 1, c. 8, &c. They require not only the *father and mother*, but also the *grand-father* and *grand-mother* of the impotent poor, to maintain them; but only in respect to such as are *unable to work*, through infancy, age, disease, or accident, and then to provide necessaries only. The common law imposes no obligation save on the *father* (possibly on the mother also), to afford support to his children, and applies to no children but those



*under twenty-one years of age.* Hence, a man is not bound to support his infant son's wife or children, nor the infant children of his own wife by a previous marriage, at least not under the principle in question; but if the daughter-in-law, or step-children, live in his family, and are treated as a part thereof, he will be liable on the ground of *agency*, for supplies procured for them, as for the rest of his family, by his wife, unless he gives notice to the contrary. An idea at one time prevailed (which receives Blackstone's sanction), that as the wife, before her second marriage, if of sufficient ability, was charged with the support of her children, the obligation, after the marriage, like her other debts, devolves on her husband; but later resolutions have ascertained this to be a fallacious analogy, the wife herself being discharged by her second marriage from *any future liability*, even supposing (what is believed to be not true), that any liability attaches to her at any time. (1 Bl. Com. 449; Rex v. Dempson, 2 Stra. 955; Rex v. Munday, 1 Stra. 190; Cooper v. Martin, 4 East. 82; Tabb v. Harrison, 4 T. R. 118; Billingsley v. Crickett, 1 Bro. C. C. 68.)

As germane to the present topic, it is expedient to enquire into the doctrines which prevail touching the maintenance of an infant out of his own fortune, if he has one. The principle, as already indicated, is, that if the father be of sufficient ability, he must himself maintain the infant child, without having any allowance therefor out of the child's estate. But if the father be himself unable to support and educate the child in a manner corresponding to the fortune he is to enjoy, a court of equity will decree such a sum to be contributed periodically, from the infant's estate, as will suffice to accomplish the object in view. But otherwise, the infant's property will be allowed to accumulate for his own benefit, unless, indeed, a legacy were left him *expressly* for maintenance. And where the father is not of ability, maintenance will be decreed for the time past, as well as to come, but without interest on the arrears. (Jackson v. Jackson, 1 Atk. 515; Fawkner v. Watts, Id. 408; Butler v. Butler, 3 Atk. 60; Jeffreys v. Jeffreys, 3 Atk. 123; Darley v. Darley, 3 Atk. 399; Hughes v. Hughes, 1 Bro. C. C. 387, & n (1); Andrews v. Partington, 3 Bro. C. C. 60, & n's (1) and (a); Munday v. Howe, 4 Bro. C. C. 223; Hoste v. Pratt, 3 Ves. 733; Simon v. Shaw, 9 Ves. 285, 288; Collis v. Blackburn, Id. 470; Maberly v. Turton, 14 Ves. 499, 500, 501, &c.; Mellish v. Mellish, 14 Ves.

516; *Evans v. Pearce & als*, 15 Grat. 515; *Griffith & al v. Bird & als*, 22 Grat. 80.)

Our law has made no provision, like the Roman law, to hinder a parent from disinheriting his children by will. It leaves every man's property at his own disposal (save what is reserved for a surviving wife), wisely conceiving that the interests of society are thereby, upon the whole, best subserved, honest industry, enterprise and thrift promoted, and the obedience and subordination of children retained. Heirs and children, however, are favorites of the courts of justice, and cannot be disinherited by any dubious or ambiguous words, there being required the utmost certainty of the testator's intention to take away the right of an heir; or, as it has been otherwise expressed, plain words of gift, or necessary implication, are required in order to disinherit an heir at law. Hence, a man's heirs, or next of kin, are not deprived of what the law gives them merely by his testamentary declaration, however formal, that they *shall not have it*, if he does not give his estate to some one else. For, besides the favor extended to the heir, if it were not so, as the *law* appoints no one else but the next of kin to take the property, and as the decedent has given it to no one else, there would be that *absence of ownership*, which is always deprecated and sought to be avoided. (1 Bl. Com. 450; *Hobart v. Suffolk*, 2 Vern. 644; *Crabtree v. Bramble*, 2 Atk. 689; *Parsons v. Freeman*, 3 Atk. 747; *Habergham v. Vincent*, 2 Ves. Jun. 225; *Berry v. Usher*, 11 Ves. 92, & n (2); *Dyer v. Dyer*, 19 Ves. 614; *Boisseau v. Aldridge*, 5 Leigh, 222.)

It exemplifies this favorable concern for children that the English courts have always held that a will of lands, executed with all the formalities of law, was revoked *by implication* (although the statute which prescribed the formalities for wills, 29 Car. II, c. 3, was silent on the subject), if the testator afterwards *married and has issue*; and in Virginia we have by statute carried this doctrine farther still, by declaring in terms that the will shall be revoked wholly or partially, according to circumstances, by the marriage alone, or by the subsequent birth of issue alone, supposing such issue to be merely pretermitted, and not disinherited. If the testator *had no child at the date of the will*, and issue is afterwards born, the will, except so far as it provides for the payment of the testator's debts, is to be construed as if the devise or legacy had been expressly limited to take effect only in case the testator



should die under age, unmarried, and without issue. And if *at the date of the will*, the testator *had a child living*, and a child be born afterwards, who is neither provided for nor expressly excluded, but only pretermitted, such after-born child, or any descendant of his, is to succeed to such portion of the decedent's estate as he would have been entitled to if the testator had died intestate, towards raising which portion the legatees and devisees are to contribute ratably. But if such after-born child, or descendant, die under the age of twenty-one years, unmarried and without issue, his portion of the estate, or so much as remains unexpended in his support and education, shall revert to the person to whom it was given by the will. (V. C. 1873, c. 118, § 17, 18.)

25. The Duty of *Protection of Legitimate Children*.

From the duty of *maintenance*, we may easily pass to that of *protection*, which is also a duty imposed on parents by the law of nature, but by the municipal law of all well-ordered societies is rather *permitted* than *enjoined*; nature, in this respect, working so strongly as to need rather a check than a spur. A parent may uphold his child in a law-suit without incurring the guilt of *maintenance*. He may also justify an assault and battery in defence of his child; and the law extends as much indulgence to the rage of a parent for an injury inflicted on his child, as if it had been done to himself. Thus, where a man's son was beaten by another boy, and the father went near a mile to find him, and then revenged his son's wrong by beating the other boy, of which beating he afterwards unfortunately died, it was held to be not murder, but manslaughter merely. Such indulgence does the law extend to the workings of parental affection and the frailty of human nature. Where, however, the act of the parent does not follow close upon the provocation, and whilst he is in the *delirium* of passion occasioned thereby; when a reasonable cooling-time has elapsed, or the passion has actually cooled, the homicide is held to be *murder*. The precise time to be allowed for parental anger, provoked by injury to a child, to subside, is not, and cannot be exactly determined. It is certain, however, that *twenty-four hours* is *more than sufficient*; and whatever be the space, violence committed afterwards is to be referred, not to passion, but to *malice*, and the *fell spirit of revenge*, for which the law has *no toleration*, how great soever the injury which may pro-

voke it. (1 Bl. Com. 450; Crim. Synops. 46, 48-'9; McWhirt's Case, 3 Grat. 595.)

3<sup>g</sup>. The Duty of *Education of Legitimate Children*.

The last duty of parents to their children is that of giving them an education suitable to their station in life, a duty pointed out by reason, and scarcely inferior in importance to that of maintenance itself. For, as Puffendorf well observes (Law of Nat. B. VI, c 2, § 12), it is not easy to imagine or allow that a parent confers any considerable benefit upon his child by bringing him into the world if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others and shameful to himself. It is, however, a duty too undefined to be easily enforced against parents by the municipal law (as that of maintenance may be), and the *common law* does not attempt it. Hence, if a stranger, unsolicited, pays for the education of an infant child, he cannot constrain the father to indemnify him unless he specially promised so to do. That the common law is wise in forbearing to enforce upon parents the acknowledged moral duty of educating their children appears not only from the *vagueness* of the obligation, but also from the ascertained fact that the parents of *nearly one-half* of those of an age to be educated, even in prosperous communities, are for the most part disabled by poverty from effecting it at their own expense. See 1 Bl. Com. 450-'51; 2 Kent's Com. 195; Kay's Report; Rigg's National Education.

If, then, the *general education* of the people is, or ought to be, an object to be desired, it must be attained otherwise than through the private agency of parents themselves. It can be accomplished only by the interposition and aid of government in some form or other. Education is undoubtedly a very great boon to the person who obtains it, and, indirectly, it is an important advantage to those connected with him. But it is not in the aspect of an individual benefit that it may be legitimately bestowed at the public expense. *Charity* constitutes no part of the functions of government. The common treasure is not to be employed save for objects which concern the whole community. That individuals are peculiarly and directly benefited by a policy which confers benefits upon the whole, is not an argument in favor of the policy; but, on the other hand, it is no argument against it. In order, therefore, to justify the application of public money to educational purposes, it must be proved that the edu-

cation conferred is for the *public advantage*, and that it is beyond the reach of private effort.

That *the whole* of every community is deeply interested in the education—moral, mental and physical—of *every person* within its limits, will seem to many, probably to most, little less than an axiom. But as in the ardor of debate it is sometimes questioned, it may not be amiss to bring together in brief the prominent considerations which are supposed to establish the proposition. And although the views to be presented constitute an essential part of the argument in favor of a system of public instruction, it is not to be understood that they contemplate the undervaluing, or lessening in any manner, of the moral obligation of parents to see to the education of their children. The influence and teachings of *home* are inestimable, especially in those most vital particulars of religion and morality; and the most successful and pervasive system of free schools will leave still ample scope for them all, with the added advantage of greater effectiveness from the government supplying that positive instruction which one-half of the parents in every society are incompetent to afford. To proceed to the considerations:

(1). *General education tends to preserve the peace and order of society.*

It is admitted that ignorance and vice are not *invariable concomitants* any more than knowledge and virtue, and that to train the head only, without a proportionate culture of the moral faculties, is to pretermitt one principal purpose of education in its justest sense; but the understanding and the heart may best be developed and disciplined in conjunction, and whatever exceptions we may fancy, or find to exist, yet taking a comprehensive survey of mankind, it cannot be denied that, other things being equal, the best instructed people are in general the most orderly, and in the main the most virtuous people.

(2). *General education tends to improve the political condition of society.*

It is universally true that "those that think must govern those that toil," unless the toilers shall be taught to think also; and in popular governments, especially in those where the right of suffrage is limited by no other condition than those of sex and adult age, the general education of the people can be deemed nothing less than an *indispensable* political requirement. How else can there exist that intelligent appreciation of public affairs amongst the people, upon the existence of

which popular government is based, and without which the general interests can hardly fail to become speedily the prey of venal and corrupt men?

(3). *General education promotes the physical comfort and the material prosperity of society.*

As intelligence discovers and employs new appliances of domestic convenience, develops new sources of wealth, and makes labor more remunerative, by economizing expenditure and amplifying results, so education, which is a principal source of intelligence, is so great a creator of material strength that the proverbial philosophy of mankind announces emphatically that "knowledge is power."

Invention is more likely to be busy amongst persons of equal apprehension and extent of information, whose hands are habitually engaged with the actual process of work, than amongst those who, not being operatives, have no special need to make their "wit save their bones." If, therefore, every operative be furnished with the rudiments of knowledge, we may expect a far richer development of new discoveries, and a more abundant utilization of the powers of nature than if the knowledge of these powers be confined to such as have no special daily occasion to employ them. To supply knowledge to the working classes is to bring brains and hands into conjunction, and to subject both to the stimulus of social needs instead of leaving them to work separately,—hands in dull despair, and brains in aimless and unpractical speculation?

(4). *General education tends to augment the productiveness and the market value of the lands of a community.*

That the productiveness of lands will be enhanced by the increased intelligence of those employed in their cultivation, is self-evident as a general truth; and especially is it so if the intelligence pervades, not the class of proprietors and managers only, but also of common laborers and operatives. The man whose hands have the work to do, and whose eyes are every minute upon the subject of his labors, if he has the rudiments of knowledge, or even so much of the habit of enquiry awakened as to notice phenomena, and to be accustomed to investigate the "why and because," is pretty sure to make a progress and to develop improvements, which it would be unreasonable to look for where labor is not intelligent, and intelligence is not laborious.

The market value of lands of course increases with their productiveness, but where general education prevails it is further increased by the greater order and

virtue of society, the diminution of crimes of violence and brutality, the superior standard of comfort, the elevation of tastes, and the progressive refinement of the community.

These considerations then, (to which if there were occasion others scarcely less potent might be added), seem satisfactorily to demonstrate that the *whole of every community* is vitally concerned in the education—moral, mental and physical—of *every person belonging to it*. The object, therefore, is one proper for governmental interposition (like the construction of roads and the maintenance of the poor), if it cannot be otherwise attained; and the question is simply, as in other cases of the interference of government to achieve general benefits which individuals are incompetent by their unaided efforts to reach, as to the extent and the best method of intervention.

There are but four modes of general education possible—namely:

1. Every parent may be left to provide for his children such instruction as he can, without the government concerning itself therewith.

2. The government may undertake to assist the *indigent alone*, leaving the rest of the community to shift for themselves.

3. The government may give *partial aid to all*, leaving each some additional expense, much or little, to bear, in the shape of tuition fee, or otherwise.

4. The government may provide, at the common expense, for the complete *elementary instruction* of all classes, just as it provides for the protection of all.

It so happens that all these systems have been severally tried for long periods of time in enlightened countries, so that we know accurately what each can do towards the *desideratum* of instructing the people; the results in each instance being in accordance with the principles indicated.

Thus, under the *first system*, which may be represented by England (which, however, has recently exchanged it for the *third*), the density and pervasiveness of the popular ignorance are well calculated to alarm, as it has alarmed, the government, threatening to be the more dangerous in proportion to the freedom of the institutions amongst which it is allowed to subsist.

In Virginia, the *second system* has disclosed results so high degree unsatisfactory, and since 1870 has been abandoned for the *fourth*; as it also has been, for the most part, in all the States of the South and West.

The *third system* illustrated its imperfections in New York, Pennsylvania, and several States of the Northwest, for a number of years, until about 1854, the two States first named exchanged it for the *fourth*; as before or since, most, if not all of the Northwestern States, have also done.

The *fourth system* has been carried out with persistency and marked success, in Prussia, Switzerland, Holland, and New England, and for a score of years in New York, Pennsylvania, and the States of the Northwest, reducing the percentage of "*illiterates*" in those several communities to a very low figure.

In the light of these examples, and of the suggestions which preceded them, the conclusion seems to be amply warranted that it is the interest and the duty of the whole of any State to see to it that *primary education* is secured for *every child* within its limits; and that the *only way* to accomplish this result is by *maintaining primary schools at the public charge, freely accessible to all, without individual expense to any.*

How far it may be also the duty of the State to establish and maintain higher institutions of learning, calculated to impart the most liberal education, is determined by very similar considerations, modified, however, in the application, according to the difference in the subject, and in the surrounding circumstances.

It is certain that the possession of a higher order of education by a due proportion of a community, if not as indispensable to the well-being of the whole, as a less degree of instruction *for all*, is yet of such value as not to allow of its being overlooked, nor of a provision for it, in some way, being pretermitted. If there be no higher seminaries, and no more advanced education than the common schools can afford, the common schools themselves, for want of duly qualified teachers, for want of an elevated standard of attainment, and for want of an enlightened public sentiment, must languish and decline; whilst very much of the industrial, political, and moral prosperity and advancement of the State, for want of wise and deeply-instructed directors and guides, must come to a pause, and go backward to decay.

The question as to such higher institutions (their necessity being admitted), is, first, whether they can be erected and maintained without contribution from the State; and second, whether, supposing them to exist, it is requisite to make them, as in the case of common

schools, *free to all*. The solution of the first proposition depends on the wealth or poverty of the people. In Virginia there never has been, and far less is there now, such a superfluity of disengaged capital as to justify the expectation that an institution of the highest grade can be created or maintained by private benefactions. If such a seminary is to exist at all, it must, under ordinary circumstances, derive its origin and a liberal annual maintenance from the public treasury. The great annual expense attending the administration of a collegiate institution of the highest class renders a considerable endowment, either from a fixed capital or from an annual appropriation, an indispensable condition. Such a seminary cannot be self-sustaining at any time. If the pupils are required to pay more than one-third to two-thirds of the total necessary cost of operating an institution of that character, it becomes too oppressive, and a very large proportion of the youth of the land must be deprived of its advantages, whilst the institution itself must soon expire from inanition, or be degraded to one of lower pretensions.

As to the second question, whether collegiate education, like that of common schools, should be *gratuitous*, and at the public charge, it is obvious that, whilst the children of all classes successively require and may profit by the instruction of common schools, a very small proportion of the youth of any country need, or are in a condition to avail themselves of collegiate teaching. There is not, therefore, the same universal *demand* for free college instruction as for free primary instruction. Nor is there the same *necessity*. When a youth is possessed of knowledge enough to fit him for college, he may generally, with a proper manliness of resolution, and with perseverance, defray the expense of *instruction* there, by his own efforts. It would seem, therefore, that however it may be expedient to extend extraordinary aid to a few of superior promise, there is no duty resting upon the government to make collegiate teaching free, but only to provide, if individual benefactions do not suffice for the purpose, that there shall be an endowment sufficient to reduce the cost to be paid by individual pupils to a standard not beyond the means of that class of persons who are likely to avail themselves of its advantages.

The general subject of the education of the people ought not to be dismissed without adverting to the policy of *compulsory education*. It can hardly be denied that the reasonings which justify a system of *free schools*



may be extended to prove that it is competent to the government also to coerce parents to give their children the benefit of them; but it by no means follows that it would be expedient to do so. There are many things which every government, especially every State government, has the power to do, which, were they done, would be pernicious in the extreme. Circumstances may be conceived where coercive attendance at school might be adopted as a *police measure*, to keep vagrant children of a crowded city from mischief or crime; but it is hard to realize any condition of things under which it would be prudent to enact a general law of that character, applicable to all localities indiscriminately. And although the existing Constitution of Virginia (Art. VIII, § 4,) expressly empowers the General Assembly to enact such laws, it may be expected that that body will be very slow to exercise the authority.

Let us now take a brief survey of the system of primary instruction which is instituted in Virginia, with a short sketch of the history of the subject amongst us.

So early as 1779, Mr. Jefferson, whose mind was deeply penetrated with a conviction of the indispensable need of an effective scheme of popular education, having undertaken, at the request of the General Assembly, in conjunction with Messrs. Pendleton and Wythe (the most distinguished jurists of that day in the Commonwealth), to make a revisal of the laws adapted to the new Republican structure of government, proposed an act whereby every county should be divided into *wards* and *districts*, and a sufficient tax be levied to maintain, not elementary schools only, but academies, colleges, and an university. In 1796 this law was in substance actually enacted, but with a single feature which annulled its efficiency. It was left to the county courts to determine whether or not the act should go into effect in their respective counties. And Mr. Jefferson, adverting to the failure of the plan, remarks that "the justices [who then composed the county courts], being generally of the more wealthy class, were unwilling to incur the burden; so that it was not suffered to commence in a single county." (2 Stats. at Large (new series), 3; 1 Jeff. Mem. 38-'9.)

This law was one of four prepared by this truly great man, and which he characterized as "*the four columns of the Republican edifice*." The other three, which took prompt effect, related to the abolition of *estates tail*, the abolition of the right of *primogeniture*, and the



establishment of the freedom of *religious belief*. Long after the fervor of authorship had subsided,—indeed, only five years before his death,—he holds the following language touching these measures:

"I proposed," says he, "three bills for the revisal, proposing three distinct grades of education, reaching all classes. 1st. Elementary schools for all children generally, rich and poor. 2d. Colleges for a middle degree of instruction, calculated for the common purposes of life, and such as would be desirable for all who were in easy circumstances. And, 3d, an ultimate grade for teaching the sciences generally, and in their highest degree."

"One provision of the elementary-school bill was that the expenses of those schools should be borne by the inhabitants of the county, every one in *proportion to his general tax rate*."

"I considered four of these bills passed or reported" (*viz.*, the school-bill for religious freedom, for abolishing entails, and abolishing the right of primogeniture), "as forming a system by which every fibre would be eradicated of ancient or future aristocracy, and a foundation laid for a government *truly republican*." The people, "by the bill for a general education, would be qualified to *understand* their rights, to *maintain* them, and to exercise with intelligence their parts in self-government; and all this would be effected without the violation of a single natural right of *any one individual citizen*." (1 Jeff. Mem. 39, 40.)

After the failure of the act of 1796, no provision for popular education seems to have been even seriously contemplated in Virginia, until about the year 1810. What is called the "*Literary Fund*" was then formed, to consist of confiscations, escheats, proceeds of *glebe-lands* belonging to the former colonial church by law established, forfeitures, fines, &c. It was subsequently swelled by two large accessions of monies received by Virginia from the Federal government, and its capital, at the commencement of the late war in 1861, amounted to about \$2,260,000.

When the fund was first instituted the revenue derived from it was dedicated exclusively to the educating of "poor children." But in 1816 some transient interest having been awakened in behalf of education, Mr. Jefferson, ever watchful to advance his projects of patriotic beneficence, seized the occasion again to bring forward his great system of public instruction; and the next year his influence, although it was inadequate to

effect the establishment of a system of free schools, which he had much at heart, yet procured an act to erect the University of Virginia, with a permanent endowment of \$15,000 a year out of the literary fund, the residue of the annual income from which was set apart, as before the whole had been, for the education of "poor children."

The system of primary education thus inaugurated, contemplating as it did *the poor alone*, and providing totally insufficient funds for even a small part of that class, was not wholly futile; but its results were meagre indeed compared with the exigency of the case. The proportion of ignorance existing under it, reckoning the white population alone, was deplorable, and was little diminished in the successive decades which elapsed prior to 1870.

The general impoverishment which succeeded the termination of the late war, together with the emancipation of the slaves, so diminished the means of supporting a system of public education, whilst it doubled the expense of doing so (duty and enlightened expediency irresistibly demanding that like provision should be made for both races, yet in separate schools), as to postpone almost indefinitely the hopes of the friends of education to see a general system fully inaugurated. Their expectations, indeed, were limited to the institution in the State-government, of a department of public instruction, trusting that, through the agency of such a bureau, the sentiment of the people might by degrees be sufficiently informed to cause them to adopt with alacrity, and sustain with vigor, some scheme of education adapted to the needs of all classes.

The result, however, which the *native* friends of the cause in the State were willing to postpone for a more auspicious season, was precipitated by the action of that remarkable assemblage which, purporting to represent the sovereignty of Virginia, in 1868, devised the Constitution which, the next year, the people of the Commonwealth found themselves under the necessity of ratifying, with some important modifications.

The Constitution of 1869 (Art. VIII, § 3), requires the General Assembly to "provide by law, at its first session under this Constitution, a uniform system of public free schools, and for its gradual, equal and full introduction into all the counties of the State by the year 1876, and as much sooner as practicable." And this constitutional requirement the Legislature, at its

first session under the Constitution, in 1869-'70, loyally performed. It remains, therefore, to state the outline of the system which, partly constitutional and partly statutory, at present prevails in this Commonwealth upon this important subject. (Va. Const. 1869, Art. VIII, § 1 to 12; Art. VII, § 1, 2, 3; Art. VI, § 25; Amendments 1874; V. C. 1873, c. 78.)

The subject distributes itself under the following heads: I. The Organization of the System; II. The Funds Designed to Support the System; and III. The Regulations for the Government of the System.

#### I. THE ORGANIZATION OF THE SYSTEM.

The organization of the system contemplates that each county shall be divided into so many compactly located *magisterial districts* (substituted for townships by amendments of 1874) as may be deemed necessary, not less than three; and each *magisterial district* into so many compactly located school districts as may be necessary, but not to contain less than one hundred inhabitants, each school district being a *corporation*, capable of suing and being sued, of contracting, and of buying and holding property. It contemplates, further, that the officers charged with the administration of the system shall be, (1), School-trustees, three for each school district; (2), A superintendent of public schools for each county; (3), County school-boards, composed of the county superintendent and district school-trustees; (4), A superintendent of public instruction for the State; and (5), A board of education, with very extensive powers of supervision and regulation of the whole machinery.

It will be needful to survey more particularly these several classes of officials, for which purpose they will be taken in the inverted order:

##### (1). *The Board of Education.*

The Board of Education is a *corporation* composed of the governor, superintendent of public instruction, and attorney-general. It is the duty of the board to appoint, and to remove for cause, and upon notice to the incumbent, subject to confirmation by the senate, all county superintendents of public free schools; to appoint and remove district school-trustees; to provide gradually for uniformity of text-books, and the furnishing of school-houses, with necessary apparatus and library, under regulations to be provided by law; to make regulations generally for the administration of the system; to submit to the Legislature an annual report; to regulate according to law the management

and investment of all school funds; and to exercise such supervision of schools of higher grades as the law shall provide. (Va. Const. 1867, Art. VIII, § 2, 6; V. C. 1873, c. 78, § 3, 7, 15, 37, 38, 47, 64, 65.)

(2). *The Superintendent of Public Instruction.*

The superintendent of public instruction is elected by the General Assembly, upon joint ballot of the two houses, to hold office for *four years*, and until his successor is qualified. He is charged with the general supervision of the public free school interests of the State; and to enable him to accomplish that object efficiently, he is clothed with large powers, and has a correspondingly wide circle of duties. Amongst other things it is his duty to interpret and expound the school laws; to prescribe the forms of registers and reports; to apportion the school funds to the several counties and cities; to make tours of inspection amongst the public schools of the State; to cause the school laws to be faithfully executed; to promote by all proper means an appreciation and desire of education amongst the people; and to submit to the General Assembly, through the Board of Education, an annual report, exhibiting all desirable statistics of numbers, expenditures and results connected with the working of the school system. (Va. Const. 1869, Art. VIII, § 1; Art. VI, § 25; V. C. 1873, c. 78, § 11.)

(3). *County Superintendent of Public Free Schools.*

County superintendents of schools, one for each county, are appointed and removed for cause, and upon notice to the incumbent by the Board of Education, subject to confirmation by the senate. The *term of office* of a county superintendent is three years, and until his successor is qualified. His *duty* is more immediately to supervise and control within his county the working of the system of free schools; to promote an appreciation and desire of education among the people; to prepare annually, or oftener if need be, under the direction of the superintendent of public instruction, a scheme for the apportionment of the State and county school funds among the school districts of the county; to examine persons applying for license to teach; to promote the improvement of teachers by all proper methods, under direction of the State superintendent; to visit all the public schools in his county as often as practicable, and inquire into every particular of their conduct and administration; to decide all questions and complaints within his county touching the school system, subject to appeal to the State superintendent,

and from him to the Board of Education; to require annually, or oftener if necessary, from the clerks of the boards of district school-trustees full statistics touching the public free schools of their respective districts; to observe the directions of the State superintendent, and to make to that officer an annual report touching such particulars as he may prescribe. (Va. Const. 1869, Art. VII, § 1; Art. VIII, § 2; Art. VI, § 25; V. C. 1873, c. 78, § 14.)

(4). *The County School Board*

The county school board is a *corporation*, composed of the county superintendent of schools and of the district school-trustees, under the style of "*The County School Board of ——— County*," with power to contract, take and hold property, and to sue and be sued. All property of every description dedicated to school purposes, for the use of the *county*, is vested in the county school board, unless inconsistent with the grant or devise, upon such terms and conditions for the security of the property as the court of the county shall prescribe. The board is to manage all such property, and apply the profits for the purposes of education, in the same manner and under the same restrictions as the general school fund is applied, except that the board may apply a portion, in their discretion, to the erection of school-houses, or the purchase of school apparatus; always provided that no disposition is made inconsistent with the grant or devise. The board is charged also with the duty of supervising the administration of all trusts for the purposes of common school education within the county, and to that end may require reports from the trustees, and, if need be, may "take immediate measures for carrying the matter before the civil courts." (V. C. 1873, c. 78, § 15 to 20.)

(5). *The District School-Trustees.*

In each school district the Board of Education appoints annually one school-trustee, whose term of office is three years, and until his successor is qualified; three having been appointed the first time for one, two, and three years, respectively. The three school-trustees constitute a board, of which one member is chairman, and another clerk, the clerk's duty being to make annually a census of the school children in his district, to gather the statistics of education therein, to keep the records of the board and preserve its papers, and to perform such other duties as may be assigned him; for which he is allowed, out of the district school funds, two dollars a day for every day of service.

The board itself is charged with the duty of carrying the school system in detail into practical effect within its district. It is to explain, enforce, and itself observe the school laws and regulations; to employ and dismiss teachers; to suspend and dismiss pupils; to supply text-books gratuitously to those too poor to procure them; to see that the school census is correctly taken; to convene meetings of the people of the district for consultation in regard to the school interests thereof; to prepare annually, and before the 15th day of November, to report to the president of the county school-board, to be laid before the board at its earliest meeting, an estimate of the amount needed during the next scholastic year for providing school-houses, school-books for indigent children, and other school appliances, and necessary, proper and lawful expenses; to take care of and manage the school property of the district; to visit the public schools within the district from time to time, and to take care that they are lawfully and efficiently conducted; and to report to the county superintendent annually, and whenever required, according to the forms prescribed. (Va. Const. 1869, Art. VII, § 3; Art. VI, § 25; Art. VIII, § 12; V. C. 1873, c. 78, § 22 to 31.)

## II. THE FUNDS DESIGNED TO SUPPORT THE SCHOOL SYSTEM.

The funds provided for the support of this educational system consist of—(1), *A fixed literary fund*, whose annual income alone is to be expended; and (2), *Annual funds*, derived from State, county and district taxes, &c.

### (1). *The Literary Fund.*

The literary fund is composed of the remnant of the old literary fund (amounting, including arrears of interest due from the Commonwealth, to somewhat over \$2,000,000), the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeiture, and all fines collected for offences committed against the State, donations made for the purpose, and such other sums as the General Assembly may appropriate. These are to be set apart as a *permanent and perpetual* "Literary Fund," to remain *unimpaired and entire*, and the *annual income* arising therefrom is dedicated *exclusively* to the maintenance of *public free schools*. (Va. Const. 1869, Art. VIII, § 7, 8; V. C. 1873, c. 78, § 66.)

(2). *Annual funds* derived from State, County, and District taxes, &c.

The *annual funds* (besides the income derived from the literary fund), consist of taxes levied by the State, taxes levied on the counties severally, and donations made thereto, and taxes levied on the school districts, and donations made to them respectively. (Va. Const. 1869, Art. VIII, § 8; V. C. 1873, c. 78, § 67.)

*First. State Taxes, &c.*

The State funds for public schools consist (besides the income from the literary fund), of a *capitation tax*, not exceeding one dollar per annum on every male citizen of twenty-one and upwards; and of such tax on property, from *one to five mills* on the dollar, as the General Assembly shall, from time to time, order to be levied.

*Second. County Taxes, &c.*

The county funds for schools embrace such tax as shall be levied by the board of supervisors of the county pursuant to law, fines and penalties arising from the violation of certain of the school laws, and donations made to the county for school purposes.

*Third. District Taxes, &c.*

The district funds for schools embrace such tax as shall be levied on the school district by the board of supervisors of the county pursuant to law, fines and penalties arising from violations of certain district regulations, and donations made to the district for school purposes. But prior to 1876, the county and district school tax together is not to exceed *two mills on the dollar* in any year.

III. REGULATIONS OF THE SYSTEM OF PUBLIC SCHOOLS.

Of the regulations which govern the school system, some are contained in the Constitution, and some are statutory; whilst others again are prescribed by the board of education. Most of the provisions relate to *primary schools*, but some of those contained in the Constitution contemplate seminaries of a higher order.

1. The General Assembly *has power*, after a full introduction of the public free school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy. (Va. Const. 1869, Art. VIII, § 4; *Ante p.* 386-'7.)

2. The General Assembly is required to establish, as soon as possible, *normal schools* (that is, schools to instruct teachers in the art of teaching), and *may* establish agricultural schools, and such grades of schools as



shall be for the public good. (Va. Const. 1869, Art. VIII, § 5.)

3. The General Assembly shall have power to foster all higher grades of schools under its supervision, and to provide for such purposes a permanent educational fund; and all grants and donations shall be applied according to the terms prescribed by the donors. (Va. Const. 1869, Art. VIII, § 9, 10.)

Thus, it will be seen that normal, agricultural and other higher seminaries are to be supported by funds separate and apart from those raised for *primary* free schools. And whilst primary schools are submitted without reserve by the Constitution, to the supervision of the superintendent of public instruction, these higher seminaries are to be supervised by the Board of Education, and by that board only as the *law shall provide*. (Va. Const. 1869, Art. VIII, § 1, 2.)

4. Each city and county shall be held accountable for the destruction of school property that may take place within its limits by incendiaries or open violence. (Va. Const. 1869, Art. VIII, § 11.)

5. No member of the Board of Education, nor any school officer or teacher, is allowed to be in any wise concerned pecuniarily, in supplying books, stationery, school furniture, apparatus, &c., to the public schools, with some cautious relaxations in favor of authors and inventors. (V. C. 1873, c. 78, § 38.)

6. No teacher can be employed in the public schools until he has obtained a certificate of qualification from the superintendent of the county within which he is employed. Contracts with teachers are to be in writing, in a form prescribed; and they enjoy the same immunities as a school trustee, namely, from serving on juries, working on roads (but not from the road tax), and from militia service in time of peace.

7. The Board of Education has power to invite and encourage meetings of teachers for mutual improvement, and to procure addresses to be made before such meetings touching the processes of school organization, discipline and instruction.

8 School houses and appliances, furniture and apparatus are to be provided by the several school districts, which have power to procure land to be condemned for school-houses, a just compensation being provided; and school-houses, and all school property are vested in the school district, and held by it as a corporation. (V. C. 1873, c. 78, § 53, 54, 48.)

9. The public schools are free to all persons between



the ages of *five* and *twenty-one* years, residing within the school district; and, in special cases, to be regulated by the Board of Education, persons residing out of the district may be admitted. But white and colored persons are not to be taught in the same school, although there is to be no difference in the provision made for them. And no one is to be admitted whose father, if alive, and resident within the district, and not a pauper, *shall not have paid the capitation school-tax last assessed upon him.* (V. C. 1873, c. 78, § 58.)

10. The Board of Education is empowered and required to regulate all matters arising in the practical administration of the school system, which are not otherwise provided for. (V. C. 1873, c. 78, § 7 (cl. 11).)

The provisions for public free schools in the cities and towns of the Commonwealth, which are essentially the same as those already described, may be seen V. C. 1873, c. 79.

Before we pass away from the subject of public instruction, it is proper to observe that our laws have always acknowledged, *in the abstract*, the value of education for the laboring classes, however remiss they may have been in making the needful provision for its universality. Thus, from a very early period of the colony, there has been an enactment, taken from the laws of the mother country, that when a child is "found begging," or is "likely to become chargeable" to the parish, an overseer of the poor shall obtain an order of the county or corporation court to bind him apprentice, stipulating with the master to teach him, not only his trade or business, but also "reading, writing, and common arithmetic, including the rule of three." (V. C. 1873, c. 122, § 3, 2, 5; 1 Bl. Com. 451.)

### 3<sup>d</sup>. Powers of Parents as to Legitimate Children.

The power of parents over their children is derived from the consideration of the duty which they owe them; the authority being conferred chiefly to enable the parent to perform his duty more effectually, but partly also as a recompense for his care and trouble in the faithful discharge of it. And since the legal duty of parents is limited at common law to those under twenty-one years of age, so, also, is their authority confined to the same age. The municipal laws of some countries have, to be sure, upon the very same considerations, bestowed upon parents a very different degree of authority, and extended it to a different age. Thus, the ancient Roman laws gave the father a power of life and death over his children, upon the falacious principle that he who gave

had also the same power of taking away. But the rigor of these laws was softened by subsequent constitutions; so that we find a father banished by the Emperor Hadrian for killing his son, though he had committed a very heinous crime (having debauched his step-mother), upon the maxim that "*patria potestas in pietate debet, non atrocitate consistere.*" But still they maintained to the last a very large and absolute authority; for a son could acquire no property of his own during the life of his father, but all his acquisitions belonged to the father, or at least the profits of them, for his life. (1 Bl. Com. 452; 2 Kent's Com. 203-'4.)

The power of the parent, as conferred by the common law, is much more moderate, but still sufficient to keep the child in order and obedience;

W. C.

#### 1<sup>st</sup>. The Custody of the Child's Person, and Power of Correction.

Let us observe, (1), The parent's right to the custody of the child's person, and his consequent power; and (2), The remedies whereby the parent may assert his right to the custody of the child when it is invaded;

W. C.

#### 1<sup>h</sup>. The Parent's Right to the Custody of the Child's Person, and his consequent Power.

The father has, against all other persons, the right to the possession and custody of his infant child under twenty-one years of age; and on his death or disability, the mother, as the next natural protector and guardian, succeeds to the like authority, even as against the guardian appointed by the father's will,—at least until she marries again, as to such testamentary guardian, and as to any other person, notwithstanding any subsequent marriage. And the parent, whether father or mother, who is thus for the time being charged with the care and custody of the child, may lawfully administer such moderate and reasonable correction as is for the benefit of his training and education. (1 Bl. Com. 452, & n (9); 2 Kent's Com. 205; V. C. 1873, c. 123, § 7; Ex. parte Hopkins, 3 P. Wms. 154; Armstrong v. Stone & ux, 9 Grat. 105; Carr v. Carr, 22 Grat. 168, 174.) The parent is also *by statute* charged with the power of consent to the marriage of his child under age, although, as we have seen, the want of such consent does not appear with us to invalidate the marriage. V. C. 1873, c. 104, § 3; *Ante* p. 243-'4.) The power is conferred with a view to protect very young persons from the arts of the

designing, and against the consequences of their own unwariness, inexperience, and heady passions, which might otherwise prevent their favorable settlement in life, and betray them into precipitate and imprudent marriages.

To invade this parental right of custody of the child by his abduction is a civil injury, for which the parent may have redress either at law or in equity; and it seems it is at common law an offence deemed worthy of exemplary punishment by fine and imprisonment. In Virginia, if the child be taken from the parent, or any one else having lawful charge of it, with intent to *extort money*, or any pecuniary benefit, it is felony (V. C. 1873, c. 187, § 15). And it is also a felony to take from any person having lawful charge of her, a *female child* under sixteen years of age, for the purpose of concubinage or prostitution (Id. § 17); whilst *illegally* to seize, take, or secrete *any child* from the person having lawful charge of it, may, at the discretion of a jury, be treated as a felony or a misdemeanor. (V. C. 1873, c. 188, § 18; 3 Bl. Com. 140-'41, & n (27); 4 do. 219; Synops. Crim. Law, 81.)

The mother, if the father be dead, or if the child be *illegitimate*, is at common law the *natural* guardian, and entitled to all the legal authority usually exercised by the father; and this proposition, notwithstanding a loosely worded intimation to the contrary from Blackstone (1 Bl. Com. 453), is undeniably established by adjudged cases, as well as by approved text writers. (1 Bac. Abr. Guardian, (A.) 3; 1 Th. Co. Lit. 155, n (2); 1 Bl. Com. 461, n (4); Mellish v. De Costa, 2 Atk. 14; People v. Landt, 2 Johns. (N. Y.) 375; Carpenter v. Whitman, 15 Johns. 209; Freto v. Brown, 4 Mass. 675; Wright v. Wright, 2 Mass. 109; Somerset v. Dighton, 12 Mass. 383; Armstrong v. Stone & ux, 9 Grat. 102, 105.) As a general proposition, it is confirmed in Virginia by statute, although the statute limits it, where there is another guardian appointed by the court, or by the father's will, to the case of her *remaining unmarried*; it being enacted (V. C. 1873, c. 123, § 7), that although another person than the parent be "appointed as aforesaid" guardian, in order to take charge of the *infant's property*, yet the father, and if he be dead, the mother, while she remains unmarried, shall, if fit for the trust, be entitled to the custody of the person of the minor, and to the care of his education.

But whilst the parent is thus undoubtedly entitled,

*prima facie*, to the custody of his minor child's person, it is because it is supposed that he will best execute the trust (of all trusts the most sacred) which God and society have committed to his hands. Hence, it is competent to a court of chancery, in pursuance of its general power to interpose for the benefit of such as are unable to protect themselves, to deprive him of such custody and control for sufficient reasons. The cause which has usually called forth this power is some gross moral delinquency on his part, such as cruelty to the child, *habitual* drunkenness, blasphemy, profligacy, or other immorality, showing him to be clearly unfit for so important a function. The jurisdiction, however, is exercised only in strong cases, and with extreme caution, as indeed is plainly required by the delicacy of the considerations involved; and although it has been warmly contested in England, and especially in a comparatively recent case of great interest (*Wellesley v. Duke of Beaufort*, 2 Russ. 1), yet it is conclusively settled, as well upon reason and necessity (having regard to the *protective* power of the court of chancery), as upon the uninterrupted usage of more than 150 years. (2 Rob. Pr. (1st Ed.) 154; 2 Stor. Eq. § 1341 & seq.; *Duke of Beaufort v. Berty*, 1 P. Wms. 705; *Whitefield v. Hales*, 12 Ves. 449; *Creuze v. Hunter*, 2 Cox, 242; *De Manneville v. De Manneville*, 10 Ves. 59; *Ex parte Mountfort*, 15 Ves. 445; *Wellesley v. Duke of Beaufort*, 2 Russ. (3 Eng. Ch.) 1; S. C. 2 Bligh, (N. S.) 128; *Shelby v. Westbrooke*, Jac. (4 Eng. Ch.) 266; *Lyons v. Blenkin*, Id. 257; *Ball v. Ball*, 2 Sim. (2 Eng. Ch.) 35; *Anon.* 2 Sim. (N. S.) (42 Eng. Ch.) 68; *People v. Mercelin*, 8 Pai. (N. Y.) 47; *People v. ———*, 19 Wend. (N. Y.) 16; *Prather v. Prather*, 4 Desauss. (S. C.) 33; *Williams v. Williams*, Id. 183.) And in Virginia this equitable jurisdiction is recognized and confirmed by statute, which provides (V. C. 1873, c. 123, § 13), that the "circuit, county, and corporation courts in chancery may hear and determine all matters between guardians and their wards, require settlements of the guardianship accounts, *remove any guardian for neglect or breach of trust*, and appoint another in his stead, and *make any order* for the custody and tuition of an infant," &c.

As incident to the parent's right to the custody of the infant child's person, and as the correlative of the obligation of maintenance, there results a right to the child's services, and to his wages if he earns any.

That this is true of the *father* there appears no just reason to doubt, but whether it holds in respect to the *mother*, where there is no father, is very questionable; because, although the mother is entitled, in the case supposed, to the custody of the child's person, she is under no obligation, it seems, to afford maintenance. (1 Bl. Com. 453; 1 Pars. Cont. 257-'8, 256, n (c); 2 Kent's Com. 194, 191; *Freto v. Brown*, 4 Mass. 675; *Jeuney v. Alden*, 12 Mass. 375; *Whiting v. Earl*, 3 Pick, (Mass.) 183.) In respect to the father, not only does he lose his right to the child's wages when he ceases to be liable for his support, but he may relinquish his *right* whilst his *liability* continues; and, according to American cases, such relinquishment will be readily inferred from any conduct on his part which manifests such an intent. Hence, if the child be living apart from his father with his consent, or if the father leave him to manage his own affairs, and to make and execute his own contracts for a considerable time, or even if the father knew of such a contract and interposed no objection, he is understood thereby to relinquish his right to the child's wages. And he may do so notwithstanding he is insolvent. (1 Pars. Cont. 258-'9, and cases cited; *Bac. Abr. Infancy*, (I.) 3; *Id.* (M.); *Penn & als v. Whitehead & als*, 17 Grat. 522.) In England emancipation from parental control is less easily inferred. It is laid down, indeed, that during the child's minority there can be no emancipation, unless he marries, and so becomes himself the head of a family, or contracts some other relation, as by enlisting for a soldier, so as *wholly and permanently* to exclude parental control. (*Rex v. Hardwicke*, 5 B. & Ald. (7 E. C. L.) 176; *R. v. Wilmington*, *Id.* 525; *R. v. Rotherfield Greys*, 1 B. & Cr. (8 E. C. L.) 345.)

2<sup>d</sup>. The Remedies whereby the Parent may assert his Right to the Custody of the Child's Person, when the Right is invaded.

These remedies may be enumerated thus—namely, (1), The action of trespass *vi et armis* (or with us, trespass on the case), to recover *damages*, but not the child's person; (2), The writ of *ravishment of ward*, whereby are recovered as well the body of the child as damages; (3), The writ of *habeas corpus*, to recover the child's person in certain cases; and (4), A bill in equity to recover the child;

W. C.

1<sup>1</sup>. The Action of Trespass *vi et armis*, or, in Virginia, of Trespass on the Case.

In this action the parent recovers *such damages* as a jury shall estimate to be proper for the wrong done, but *not the body of the child*. (1 Bl. Com. 463, n (9); Bac. Abr. Guard'n (F); Hussey's Case, 9 Co. 72 a; Rex v. Smith, 2 Stra. 982; 1 Chit. Pl. 192; Vaughan v. Rodes, 2 McCord (S. C.) 227.) It is apprehended that the action may also be, at common law, trespass *on the case*, to recover similar damages. (1 Chit. Pl. 192-'3.) But however it may be at common law, in Virginia, by statute, in any case in which an action of trespass will lie, there may be maintained an action of trespass *on the case*. (V. C. 1873, c. 145, § 6.)

2<sup>1</sup>. The Writ of *Ravishment of Ward*.

By this writ, given by Stat. Westm. II, 13 Edw. I, c. 35, is recovered *the body of the child, together with damages for the taking and detention*, and not damages only, as by the remedy last mentioned. The statute is in terms applicable to *guardians*, but a parent may employ it as a *guardian by nature*. (1 Th. Co. Lit. 338; Bac. Abr. Guard'n (F); 1 Bl. Com. 463, n (9); 3 Do. 141; Hussey's Case, 9 Co. 72, 74 b; Eyre v. Countess of Shaftsbury, 2 P. Wms. 122.)

The writ of ravishment of ward being a remedial writ, given by a general statute of England prior to 4 Jac. I, is reserved in Virginia by statute (V. C. 1873, c. 15, § 2) to the use of our people.

3<sup>1</sup>. The Writ of *Habeas Corpus*.

The writ of *habeas corpus* is proper only to relieve one from an *illegal restraint on his liberty*. It is, therefore, only *collaterally* that the question of right to the custody of the child by the parent can arise upon the proceeding, and never where the infant has sufficient discretion to choose for himself with whom he will be, which may be supposed to be the case whenever he has attained the age of *fourteen*. Where, having attained the age of discretion, he is brought up upon a writ of *habeas corpus*, if he is restrained of his freedom of locomotion, he will be released and suffered to go where he pleases, and if not restrained, but by his own choice he is with his present custodian, the effect of the writ is exhausted, and the court cannot transfer him to the parent, notwithstanding it might be ever so well satisfied that the parent was entitled to his custody. But where

the infant is too young to elect with discretion with whom he will stay (as if he be of the age of six or seven, or, it seems, of any age *under fourteen*), any custody but that of the person entitled to it is wrongful, and may be deemed illegal restraint of the child; and so the court must determine, in order to give effect to the writ, whose is the proper custody, and must remand him thereto. (*Rex v. Clarkson*, 1 Stra. 444; *R. v. Johnson*, Id. 579; *R. v. Smith*, 2 Stra. 982; *R. v. Delaval*, 3 Burr. 1434; *In re Pearson*, 4 J. B. Moore (16 E. C. L.) 366; *Ex parte Skinner*, 9 J. B. Moore (17 E. C. L.) 278; *King v. Greenhill*, 4 Ad. & El. (31 E. C. L.) 624; *King v. Isley & ux*, 5 Ad. & El. (31 E. C. L.) 441; *In re Hakewell*, 12 C. B. (74 E. C. L.) 223; *Ex parte Witte*, 13 C. B. (76 E. C. L.) 680; *Armstrong v. Stone & ux*, 9 Grat. 102.)

#### 4<sup>1</sup>. Bill in Equity.

This is the most direct, usual, and eligible remedy, in general, to try the right of the parent to the custody of the child. The court of chancery, as representing the parental and protecting power of the Commonwealth, has jurisdiction to determine controversies concerning the guardianship of a minor; to make orders for his support, if any property capable of being so applied be within the reach of the court; and in extreme cases, as we have seen, even to control the right of a father to the custody of his child. (2 Stor. Eq. § 1340; *De Manneville v. De Manneville*, 10 Ves. 52; *Ex parte Skinner*, 9 J. B. Moore, (17 E. C. L.) 278; *The People v. Chagary*, 18 Wend. (N. Y.) 637; *Armstrong v. Stone & ux*, 9 Grat. 105-6.)

#### 2<sup>5</sup>. Parent's Power to *Consent to the Marriage* of a minor Child.

The common law did not demand the consent of parents, in order to legalize, or even to make regular, the marriage of an infant. In England, by Stat. 4 & 5 Ph. & M. c. 8, heavy penalties were imposed on any person who should marry a woman-child under the age of *sixteen years*, without consent of parents or guardians, and her estate was moreover transferred during the husband's life to the next heir; and by 6 & 7 Wm. III. c. 6, and other statutes, a considerable fine was laid on any clergyman who should celebrate a marriage without the publication of *banns*, which would give notice to parents and guardians, or without a license, to obtain which their consent must have been sworn to.



But by Stat. 26 Geo. II, c. 33, marriages celebrated *by license* (for banns suppose notice), where either party is under twenty-one (and not previously *widowed*, in which case they are emancipated), without the consent of the father, or if he be dead, of the mother or guardian, were declared to be *absolutely void*. This innovation upon the ancient law, whilst it had the expedient effect of preventing the clandestine marriage of minors, was supposed upon the whole to be pernicious, by tending to obstruct the increase of population, and by betraying the single of both sexes, especially among the lower classes, into licentiousness and debauchery, particularly affecting the presumed wife, whose very innocence and simplicity exposed her peculiarly to be deceived. Dissatisfaction with this state of the law led at length to the Act of 4 Geo. IV, c. 76, and of 6 & 7 Wm. IV, c. 85, whereby the consent of parents and guardians was *directed* to be obtained, and marriage without it was made *penal* in the parties, and their abettors, but *neither void nor voidable*. And the subsequent statutes appear to adopt the same policy. (1 Bl. Com. 437; 2 Steph. Com. 286, 288, & seq.; Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29.)

In Virginia, as we have seen, the law is in a state of some uncertainty upon this point; but upon the whole, it appears to be the better opinion that the terms of the statute requiring license, and consent of parents or guardians, where either party is under the age of twenty-one years, and not before married (V. C. 1873, c. 104, § 1, 3), are *directory only*; and that the marriage is not invalidated by the want of a license, or of the consent of parent or guardian (*Ante* p. 243-4; Grot. de Jur. Bel. &c. B. II, c. v, § 16; Rex v. Birmingham, 8 B. & Cr. (15 E. C. L.) 29.)

### 3<sup>s</sup>. The Power and Control of Parents *over the minor Child's Estate*.

The parent, as such, has no power or control whatever over the infant child's property, real or personal. Hence, the father is not, by virtue merely of the parental relation, entitled to receive a legacy payable to his child, even though the testator may have *verbally* so directed on his death-bed; and if the executor make payment to him, it is in his own wrong, and he is liable to pay it over again should the father fail duly to appropriate it. In order to qualify himself to deal with the property-interests of his minor child, a parent must be duly appointed *guardian*, by a competent court, and must give bond and security as required by law. (1

Bl. Com. 453; 2 Lom. Ex'ors, 251-'2; 2 Rob. Pr. (1st Ed.) 155; Dagley v. Tolferry, 1 P. Wms. 285; Cooper v. Thornton, 3 Br. C. C. 96.)

If, however, another person than the parent be appointed guardian, in order to take care of the infant's property, the father, or if he be dead, the mother, while she *remains unmarried*, shall, if fit for the trust, be entitled to the *custody of the minor's person*, and to the *care of his education*. (V. C. 1873, c. 123, § 7.)

4<sup>th</sup>. Parent's Power to *delegate his Authority*; W. C.

1<sup>st</sup>. Parent's Power to delegate his Authority *during his Life Time*.

The power of the parent to delegate his authority, during his life time, to the tutor or schoolmaster of his minor child, is acknowledged at common law. The tutor is then *in loco parentis*, and has such a portion of the parental authority as may be necessary to answer the purposes for which he is employed. But this power must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement to the same extent as the parent might, howsoever the infant delinquent may seem to have deserved it. (1 Bl. Com. 443, & n (12).)

But this parental power does not extend to apprenticing a minor child, without his assent, expressed for the most part by his being a party to the indentures of apprenticeship, which, without the child's concurrence, are at common law, not merely *voidable*, but as to him, *totally void*. (*Ante* p 181, 1<sup>st</sup>; Bac. Abr. Master, &c. (A), 1; Rex v. Armesby, 3 B. & Ald. (5 E. C. L.) 584; Pierce v. Massenberg, 4 Leigh, 493.) And in Virginia, by statute, if the minor be *under fourteen years of age*, the county or corporation court must add its sanction. (V. C. 1873, c. 122, § 1.)

2<sup>nd</sup>. Parent's Power to delegate his Authority *after his Death*.

The parent possessed at common law no power to delegate his authority after his death. Such power, wherever it exists, is exclusively statutory, and is therefore regulated by the *terms of the statute*. It was first conferred in England by 12 Car. II, c. 24 (A. D. 1660), in consequence of the abolition of the *Chivalry Tenure* of land, to which, down to that time, the wardship most frequently recurring had been incident. Wardship in chivalry having ceased to exist, along with the tenure to which it belonged, the statute in question proposed to clothe the father with power to substitute the guardian in chivalry by one of his own

selection. Accordingly, by 12 Car. II, c. 24, it was enacted that the *father* (but not the mother) might, *by deed or will*, confer the custody of his child, either born or unborn, on whom he will (except a Popish recusant), *until the age of twenty-one*. (1 Bl. Com. 453, 462; Bac. Abr. Guard'n (A), 3.) In Virginia, a similar power may be exercised by the *father*, but *by will only*, and not by deed. And the guardian thus appointed is entitled, not only to the custody of the ward's person, saving the *right of the mother*, as already explained (*Ante* p. 403, 3<sup>s</sup>) but also (as it will be remembered, the parent, as such, is not), to the possession, care, and management of his estate; for the due administration of which, therefore, he must give bond and security.

5<sup>s</sup>. Period when the *Parent's Power terminates*.

The power of the parent over his child terminates at marriage, as is supposed, or at the age of *twenty-one*; for the child is then enfranchised, being supposed to have arrived at the age of full discretion, at least at that point which the law has established, as some must necessarily be established, when the empire of the father or other guardian gives place to the empire of reason. (1 Bl. Com. 453.) At what period precisely it is that the age of twenty-one is reached, whether on the last or the first moment of the twenty-first anniversary of birth, or, as Blackstone and other text-writers strangely affirm (1 Bl. Com. 463, & n (12),) on the *day preceding* that anniversary, will be explained in connexion with the next chapter—of Guardian and Ward (*Post* p. .).

4<sup>t</sup>. The *Duties* of Legitimate Children to Parents.

The duties of children to their parents arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe subjection and obedience during minority, and honor and reverence ever after. They who protected the weakness of our infancy are entitled to our protection in the infirmity of their age. They who, by sustenance and education have enabled their offspring to prosper, ought (at least in moral and religious duty, if not in legal obligation) to be supported by that offspring, in case they stand in need of assistance. And upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. Let us then consider—(1), The duty of obedience to parents; (2), The duty of protecting parents; and, (3), The duty of maintenance of parents.

W. C.

14. *The Duty of Obedience to Parents.*

The duty of obedience to parents on the part of minor children is a perfect duty, enjoined by the common law, and which it is lawful for the parent to enforce, as we have seen, in his own domestic forum, by reasonable restraint and correction, and that for the child's benefit. How far the parent's authority may be aided and supplemented by the intervention of a court of equity, seems never to have been precisely determined in the case of a *parent*, although the power was asserted by Lord Hardwicke, in *Hill v. Turner*, 1 Atk. 516; but as that court assists any other guardian in exercising a just and reasonable obedience on the part of a ward, there seems to be no reason why it might not in like manner interpose, if the occasion for it arose, in behalf of a parent; although hapless indeed is the parent whose authority and control require thus to be sustained. Thus, in *Tremain's Case* (1 Stra. 167), an infant ward having persisted in going to Oxford, contrary to the order of his guardian, who wished him to go to Cambridge, Lord Macclesfield sent his own tip-staff to convey him from Oxford to Cambridge, and upon the youth's returning to Oxford, the chancellor dispatched his tip-staff again to carry him to Cambridge, and *keep him there*. So some years afterwards, in *Hull v. Hull*, (3 Atk. 721), Lord Hardwicke obliged a lad of sixteen to return to Eton school, where his guardian had placed him, and whence, contrary to the guardian's wishes, he had withdrawn. (2 Stor. Eq. § 1340.)

The child, owing to the parent this duty of obedience, cannot be expected, immediately after attaining his age, to shake off at once the influence of long habit and duty; and for that reason transactions of business between a parent and a child just come of age are viewed with a jealous eye, and if any undue influence appears to have been exerted, and especially if any advantage has been taken of the child, a court of equity will interpose and cancel the contract or conveyance, provided the application be not unreasonably postponed, until other persons have acquired rights from the transaction, or by the death of the parent or otherwise, the explanation of the suspicious circumstances has become impossible or difficult. But whilst the mere relation of parent and child weighs much in deciding a question of alleged fraudulent advantage, where other circumstances conspire to prove the charge, yet the trans-

action is never to be set aside exclusively because of the relation; nor even though some influence shall seem to have been employed, if the arrangement entered into between the parties be reasonable, and for a laudable purpose. (Corking v. Pratt, 1 Ves. Sen'r, 401; Corry v. Corry, Id. 19; Heron v. Heron, 2 Atk. 159; Young v. Peachy, Id. 258; Blackburn v. Edgeley, 1 P. Wms. 607; Kinchant v. Kinchant, 1 Bro. C. C. 369; Brown v. Carter, 5 Ves. 879; Haguenin v. Beazley, 14 Ves. 289; Waller v. Armistead's Adm'rs, 2 Leigh, 11; Jenkins & al v. Dye & al, 12 Pet. 253-'4.)

2<sup>s</sup>. The duty of *Protecting Parents*.

The duty of protecting parents, like that of protecting children, is hardly capable of enforcement by law, and is, indeed, rather permitted than enjoined. A child may uphold his parent in law suits without being guilty of the legal offence of *maintenance*; and he may justify an assault and battery in defence of his parent's person as much as of his own. Nor does the permission thus extended to the child vary, as in the Athenian laws, as mentioned by Blackstone, with the character of the parent, the ties of nature not being dissolved by the parent's misconduct. A child, therefore, is equally justified in defending the person or in maintaining the suit of a bad parent as a good one. (1 Bl. Com. 454; *Ante*, p. 380, 2<sup>s</sup>.)

3<sup>s</sup>. The duty of the *Maintenance of Parents*.

The common law lays not upon children any *legal* obligation to maintain their parents, whatever may be their ability or the parent's need, leaving the child who disregards so plain and high a moral and religious duty to the reprobation of society and the reproaches of his own conscience.

In England the Stat. 43 Eliz. c. 2, has come to the aid of the common law, and in order to *relieve the parish*, compels children, and perhaps grandchildren, if of sufficient ability, to maintain and provide for their progenitors. But this statute is not in force in Virginia; so that the doctrine here remains as at common law. (1 Bl. Com. 454, n (13); 2 Kent's Com. 208; 1 Tuck. Com. (B. I) 128; Rex v. Munden, 1 Str. 190; R. v. Benoier, 2 Ld. Raym. 1554.)

2<sup>o</sup>. Illegitimate Children, or *Bastards*; W. C.

1<sup>t</sup>. Definition of an Illegitimate Child, or Bastard.

A bastard, by the common law, is one who is not only begotten, but *born* out of *lawful wedlock*, or not within a competent time (from nine to ten months) after its determination, or who is born in lawful wedlock when procre-

ation by the husband is *for any cause impossible*. (1 Bl. Com. 454, 455, & n. 14; 457.) Hence, one born a bastard is not, at common law, legitimated by the subsequent intermarriage of his parents, notwithstanding they acknowledge him as their offspring, a doctrine which is in direct conflict with the civil and canon laws, and for which Blackstone, with his wonted unhesitating commendation of the doctrines of the common law, assigns several very flimsy reasons, which he supposes may have influenced the brave and sagacious, but semi-barbarous, barons at the parliament at Merton (20 Hen. III. c. 9. A. D. 1325), to return their famous answer to the prelates who wished them to adopt, in this particular, the rule of the civil and canon laws—*quod nolunt leges Angliæ mutare*. And hence, also, if the marriage be ascertained to be *unlawful ab initio*, whether for a *legal disability*, which, it will be remembered, makes it void *per se*, and *from the beginning* (*Ante*, p. 239, 1<sup>k</sup>), or for a *canonical impediment*, by means of a sentence of divorce *a vinculo* in the life time of both parties, whereby the marriage is annulled *ab initio* (*Ante*, p. 236-7, 1<sup>k</sup>), the issue is in either case illegitimate, because not born in *lawful wedlock*. (1 Bl. Com. 456-7.)

Upon these common law principles the statutes of Virginia have made very material and very wise innovations. Thus, it is enacted (V. C. 1873, c. 119, § 6) that if a man having had a child or children by a woman shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after the marriage (and even after the death of the child), shall be *deemed legitimate*. (*Ash v. Way's Adm'r*, 2 Grat. 203.) And also (V. C. 1873, c. 119, § 7), that "the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate." (*Stone v. Keeling*, 5 Call, 143.)

The definition of a bastard, therefore, is not the same with us as at common law, but may be expressed thus: "A bastard, in Virginia, is one born out of wedlock (lawful or unlawful), or not within a competent time after the coverture is determined (which time is ascertained by statute not to exceed *ten months* (V. C. 1873, c. 119, § 8); or if born out of wedlock, whose parents do not afterwards intermarry, and the father acknowledge the child; or who is born in wedlock, when procreation by the husband is *for any cause impossible*."

From what has been said, it appears that all children born before matrimony are with us bastards, unless the parents afterwards intermarry, and the father acknow-



ledge the child; and so it is of all children born so long after the determination of the coverture, by death or divorce, that, by the usual course of gestation, they *could not* have been begotten by the husband. But this being a matter of some uncertainty, the law is not exact as to a few days. The usual period is nine calendar months; but there is very commonly a difference of one, two, or three weeks; and therefore, in order to prevent controversy, our statute has prescribed, as we have seen, a *maximum* period, in cases of *inheritance*, of *ten months*. "Any person *in ventre sa mere*, who may be born *in ten months* after the death of the intestate, shall be capable of taking the inheritance in the same manner as if he were in being at the time of such death. (V. C. 1873, c. 119, § 8.)

The uncertainty in point of fact of the precise period of gestation gives occasion to a proceeding at common law, when a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate; an attempt which the rigor of the Gothic Constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case, at common law, and with us, the heir, or other person interested, immediately or contingently, may have a writ *de ventre inspiciendo*, to examine whether she be with child or not; and if she be, to keep her under proper restraint till delivered; which is also entirely conformable to the practice of the civil law; but if the widow, upon examination, be proved not pregnant, the presumptive heir or successor to the estate shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within the legal period.

The writ *de ventre inspiciendo*—which is said to be of *common right*, and not in the discretion of the court,—directs the sheriff or sergeant to summon a jury of twelve men, and as many women, by whom the female is to be examined (*tractari per ubera et ventrem*), in the *presence of the men*, the exigency of the case dispensing at once with common decency and respectful deference to the sex. If this mandate were strictly observed, according to its terms, it would be, as Mr. Hargrave justly observes, an *intolerable grievance*. It seems, however, that the courts have, sometimes, at least, winked at the men's withdrawing themselves during the search. It appears from some of the reports, that it was so managed in Willoughby's case, mentioned below, although, according to Croke, the writ was literally complied with. At all events, for more than a century past, the courts



have been accustomed to make a previous order that the writ should issue unless by a designated time, and from time to time afterwards, the female shall submit to a satisfactory examination by women of skill, who may report her condition to the court; and thus the actual employment of the writ seems to have been avoided. (Reg. Brev. Orig. 227 a; 1 Th. Co. Lit. 143-'4, & n (7); Vin. Abr. Ventre Inspec'o (A); Willoughby's case, 2 Cro. (Eliz.) 566; Theaker's case, 3 Cro. (Jac.) 685; Aiscough's case, 2 P. Wms. 591; *Ex parte Wallop*, 4 Bro. C. C. 90.) The exercise of such a *dispensing power* by the courts, in order to soften the rigor of the proceeding, suggests, in Mr. Hargrave's opinion, the expediency of a statute to regulate it, and bring it more in harmony with the demands of modern propriety; and, it might be added, to make the examination more trustworthy, by confiding it to two or three skilled persons.

If a man dies, and his widow soon after marries again, and a child is born within such a time as that, by the course of nature, it might have been begotten by either husband, in this case, according to Blackstone (1 Bl. Com. 457), the child, when he arrives at years of discretion, may choose which of the fathers he pleases. The better opinion, however, seems to be that the paternity is a *fact* which is to be determined *by the proofs*. Thus, in Theaker's case, 3 Cro. (Jac.) 685, the husband, Theaker, died 15th February, 1623, and his wife Mary married Duncombe, who had been previously suspected of being her paramour, *within a week* afterwards. The cousin and heir of Theaker, the deceased husband, sued out the writ *de ventre, &c.*, which was expressed in the form above described, and, according to Croke, was executed in conformity to its terms. She was found with child, and being delivered, the child, although born two hundred and eighty-one days and sixteen hours after Theaker's death, was yet, notwithstanding her incontinency and her precipitate marriage, subsequently found, by the verdict of a jury, *to be the issue of Theaker*. (Lilly's Pract. Reg. 776-'7; 1 Th. Co. Lit. 140, n (2).)

To prevent this ambiguous paternity, and also other civil inconveniences, the Roman law ordained that no widow should marry for a year, *infra annum luctus*; and the same constitution was probably handed down to our early British ancestors, from the Romans, during their stay in Britain; for we find it established under the Saxon and Danish governments, although lost sight of by the common law after the Conquest. (1 Bl. Com.

456-'7; 1 Th. Co. Lit. 140, n (2); Theaker's Case, 3 Cro. (Jac.) 685.)

As bastards may be born before the coverture is begun, and also after it is ended, so also, as may be gathered from the definition, children born *during wedlock* may be bastards where procreation by the husband appears *to have been impossible*. But *probabilities* in such a case are not to be weighed. The law presumes *absolutely* for the legitimacy, unless procreation by the husband is proved to have been *impossible*. It admits of no inquiries, at once uncertain and indecent, amongst *mere probabilities*. Such impossibility may arise, not only from the husband's continued *absence abroad*, during the period when the child must have been begotten (according to a once prevalent idea), but from any cause whatever; as from the husband's *impotency*, growing out of his extreme youth (being under fourteen); from the *proved non-access* of the husband within such period as by the law of nature would render it possible for him to have begotten the issue; from *presumed non-access* (which, however, may be rebutted), in case of a divorce *a mensa et toro*; or from the child being of *mixed race* (mulatto), whilst the husband and wife are of unmixed, and of the same race, as both white, or both negro. The fact of access, where it is *possible*, is always presumed conclusively; but non-access (that is, the non-existence of sexual intercourse), or rather the impossibility of access, under the circumstances, as well as the fact of impotency, may in all cases be proved by such legal evidence as is admissible in other instances where a physical fact is to be established. (1 Th. Co. Lit. 138-'9, and n's (1), (B), (2); Bac. Abr. Bastardy (A); Banbury Peerage Case, 1 Sim. & Stu. (1 Eng. Ch.) 153; Head v. Head, Id. 152; 2 Greenl. Evid, § 150 to 153; Stegall v. Stegall's Adm'r, 2 Brock. 258; Lyle v. O. P. Ohio County, 8 Grat. 20; Watkins v. Carlton, &c., 10 Leigh, 574.)

A similar presumption of legitimacy arises when the child is *born in wedlock*, although at too short an interval after marriage to have been *begotten* in wedlock; and it prevails not only where the woman is *grossment enceinte*, in which case the marriage may fairly be regarded as a public acknowledgment by the husband that the child is his; but it is so also where the pregnancy was not obvious to view. The presumption of legitimacy can only be repelled, as in other cases, by proving the *impossibility* of procreation by the husband. (Bac. Abr.

Bastardy (A); *Bowles v. Bingham*, 2 Munf. 442; S. C. 3 Munf. 599; *Rex v. Luffe*, 8 East. 193.)

2<sup>d</sup>. The duty of Parents to Bastards.

The parent (that is, *the father*) of a bastard owes him in law, for the most part, no other duty than that of *maintenance*; and he owes that not by the common law, but only by virtue of the statute. For though bastards are looked upon, so far as regards the father, as not his children to any definite civil purposes, yet the obligations of nature, of which maintenance is one, are not so easily dispensed with; and these obligations hold indeed, as to many other particulars—as, especially, that no marriage shall take place within the prohibited degrees of kindred; as, for example, between (or with) bastard sons and daughters. The Roman law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances, was neither consonant to nature nor reason, however profligate the parents may have been. (1 Bl. Com. 458.)

W. C.

1<sup>st</sup>. The Mode of Compelling a Father to support his Bastard Child.

The mode of compelling a father to support his bastard offspring is purely statutory, the obligation not being recognized by the common law, because it was conceived that there was no certain mode of ascertaining who the father was. The provisions of our statute, as hitherto it has been, may be seen, V. C. 1873, c. 121, § 1 & seq.; and although, by Acts 1874—'5, c. 112, p. 94, the statute has been repealed, apparently from apprehensions of collision with the Federal authorities, yet as a sound public policy will almost surely soon demand its substantial reinstatement, it is deemed best not to pretermitt it.

The original complaint can be made by the *mother alone*, and not by the overseer of the poor, although the sole purpose of the proceeding is to *procure indemnity for the parish* against the expense of the bastard's maintenance. But after the accusation has been once made, the proceeding thereupon may be had at the instance either of *the woman*, or of the *overseer of the poor*. (V. C. 1873, c. 121, § 1, 3; Bac. Abr. Bastardy (E), B. 2, § 2, (p. 105); *Mann v. Com'th*, 6 Munf. 452.)

According to the terms of the statute (V. C. 1873, c. 121, § 1), the complaint may be preferred by "any *unmarried white woman*" who "*has been delivered*" of a bastard child. But both the English cases and our own construe the statute, notwithstanding its terms, as

applicable to the case of a *married woman* delivered of a child, who could not *possibly*, under the circumstances, *have been begotten by the husband*, from what cause soever the impossibility proceeds, whether from the husband's absence, and therefore *non-access* (as in *Rex v. Albertson*, 1 *Ld. Raym.* 395; *R. v. Luffe*, 8 *East.* 193; *Lyle v. O. P. Ohio Co.*, 8 *Grat.* 20), or from his *impotency* (as in *Foxcroft's Case*, 2 *Rolle Abr.* 353; *Bac. Abr. Bastardy (A.)*; *Rex v. Luffe*, 8 *East.* 193), or from the child being of *mixed race*, whilst the husband and wife are of unmixed, and of the same race (as in *Watkins, &c., v. Carlton, &c.*, 10 *Leigh*, 574.)

The statute still requires the woman *to be white*, so that no provision exists to compel a putative father to maintain a bastard born of a *colored woman* (that is, a woman having *one-fourth or more of negro blood*), or of an *Indian woman* (that is, a woman having *one-fourth or more of Indian blood*). (*V. C.* 1873, c. 103, § 2.) It has been thought by some, however, that this diversity, at least when the proceeding is by the woman herself, may be obviated, if not by the *Civil Rights act* of 1866 (14 *U. States Stats.* 27); yet by Amendments to the *U. S. Constitution*, Art. XIV, § 1, whereby it is declared that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside"; that "no State shall make or enforce any law which shall *abridge the privileges or immunities* of citizens of the United States," nor "deny to any person within its jurisdiction the *equal benefit of the laws*." To this suggestion it would seem to be a sufficient answer that the proceeding, as we shall presently see, is *solely for the indemnity of the parish*, and can in no case redound to the benefit of the mother, the parish being alike liable to support the child, and the mother not liable, whether the putative father can be subjected or not. It is not, therefore, a proceeding for the security of her *person or property*; and the State, by refusing to compel a putative father to maintain a bastard born of any other than a white woman, does not abridge the *privileges or immunities* of such a mother, nor deny to her the *equal benefit of the laws*. It is probable, however, that the retention of the word "*white*" will not be deemed indispensable, the discretion and discernment of the county and corporation courts affording adequate protection against the false

accusations of colored women; and that the word will be ultimately stricken out.

The reader will observe that no accusation is permitted to be made until the woman has been *actually delivered*.

The complaint is to be preferred (V. C. 1873, c. 121, § 1.) before a justice of the peace of the county or corporation in which the woman has "*resided*" (that is, has been "*domiciled*") "for the next preceding year." The justice is required to examine the woman "under oath, and reduce her statement to writing, and sign it;" and on such examination, "unless the child appear to be *seven years old*" (in which case it is supposed that it is not likely to become chargeable to the parish), "a warrant may be issued requiring the person so accused to be apprehended and brought before a justice of the county or corporation in which he *may be found*, who shall require him to enter into a recognizance, with one or more sufficient sureties, in not less than \$50, nor more than \$200, to appear at the next term for the county or corporation in which the warrant is issued, to *abide the order of the court*," which recognizance is to continue in force until final judgment, unless the accused, being required, shall give a new recognizance, or shall be committed to jail. (V. C. 1873, c. 121, § 1, 2; Mann v. Commonwealth, 6 Munf. 452; Howard v. O. P. Powhatan Co. 1 Rand. 464.)

At the hearing before the court, the woman is a *competent witness*, unless she has been convicted of some crime (felony, or other *infamous offence*), which would render her incompetent in another cause. And the accused also, *if he desire it*, may be examined on oath, and his statement be weighed along with hers. If upon the whole the court shall adjudge the accused to be the father, it shall order him to pay to the overseers of the poor, for the maintenance of the child, such sums for each year as it may deem proper, until such time as the court may appoint, unless the child die sooner; the payment to be secured by bond, with sufficient sureties, and he to stand committed to jail until the bond be given in court or filed in the clerk's office, or the woman and the overseers consent to his discharge, or he be otherwise legally discharged. And as often as the condition of the bond is broken by non-payment, the money due, with lawful interest thereon, may be recovered in the court of the county or corporation, on motion of the overseers, on ten days' notice. The attorney for the county or corporation is required to ap-

pear on behalf of the woman, or of the overseers of the poor, in such motions, and in all the proceedings for bastardy. (V. C. 1873, c. 121, § 5 to 8; Id. c. 163, § 4; Bac. Abr. Bastardy, (E).)

It should be observed, that although in Virginia the woman is, by the terms of the statute, a competent witness, in some of the States there is the remarkable qualification that she must, *during her travail*, have charged the accused, whilst in others it is required that she should have *continued constant* in her accusation of him. And whilst with us there is express power conferred on the court to oblige the accused to continue the annual payments "until such time as the *court may appoint*, unless the child die sooner," such a vague and unlimited order, which might extend beyond the bastard's minority, would, independently of the statute, be quashed for uncertainty; and so also, even under the statute, would be an order to pay to the overseers *unconditionally* to a certain age of the child, because it might die meanwhile; and it is a fundamental principle underlying the subject that the parish can never demand anything *but an indemnity* for the outlay actually incurred. (Bac. Abr. Bastardy (E); Id. Bastardy (E), B. 2, § 6, (p. 106); Rex v. Barebaker, 2 Salk. 478, pl. 24; R. v. Street, 2 Stra. 788.)

As the statute seeks to charge the putative father merely in order that he may *indemnify the parish* for the bastard's maintenance, he is liable only from the time the bastard becomes thus chargeable to the parish, although it is not necessary that the parish should have actually paid the money, if it is *liable to pay it*. (Bac. Abr. Bastardy, (E); Falls v. O. P. Augusta Co. 3 Munf. 495; Lyle v. O. P. Ohio Co. 8 Grat. 20; Willard v. O. P. Wood Co. 9 Grat. 139.) It follows, also, that even if a bond were executed to the overseers for the payment of a given sum, at all events, it is still no more than an *indemnity*,—and that is all the overseers can ask, or can recover upon it; so that no action can be maintained by them on such bond, if they have neither paid nor incurred any expense. Nay, if the putative father has paid the overseers a sum of money in gross, in satisfaction of the parish's demands upon him, and the child dies, the father may recover the residue unexpended, as money had and received to his use. It is, indeed, a transaction objectionable in point of policy, and not warranted by law, thus to receive a sum in gross, and if received otherwise than a mere indemnity, would tend to tempt the parish officers to ne-



glect the child, or even to abridge its life. Hence, although the overseers who received the money have gone out of office, and have turned the money unexpended over to their successors, they are notwithstanding liable to an action therefor. (Bac. Abr. Bastardy (E); *Cole v. Gower*, 6 East. 110; *Wilde v. Griffin*, 5 Esp. 141; *Watkins v. Hewlett*, 1 Bro. & B. (5 E. C. L.) 1; *Townson v. Wilson & als*, 1 Camp. 397; *Stainforth v. Staggs*, Id. 398, note, & 564.)

To an action by the overseers upon such a bond of indemnity as is above supposed, it is no defence on the part of the putative father to aver an offer to take and keep the child himself, because he has no right to its custody, as we shall presently see, and besides that is no fulfilment of the condition of the bond. (Bac. Abr. Bastardy (E); *Strangways v. Robinson*, 4 Taunt. 498; *Pope v. Sale*, 7 Bingh. (20 E. C. L.) 477.)

## 2<sup>s</sup>. The Custody of Bastard Children.

The putative father of a bastard, although constrained to support it, has still no claim to its custody, at least as against *the mother*. As against *a stranger*, it might be otherwise. (*The People v. Landt*, 2 Johns. (N. Y.) 375; *Carpenter v. Whitman*, 15 Johns. 209; *Holland v. Malken*, 2 Wils. 126; *Rex v. Soper*, 5 T. R. 278; *R. v. Moseley*, 5 East. 224, *in notes*; *Ex parte Ann Knee*, 1 Bos. & P. (N. R.) 149.) The mother, however, is the natural guardian of the child, primarily entitled to the care and custody of it; but subject, as we have seen legitimate parents also are, to be deprived of such custody by the court of chancery for grave reasons. (*Cases supra*; *Ante* p. 399, 1<sup>h</sup>.)

## 3<sup>d</sup>. The Rights and Incapacities of Bastards; W. C.

### 1<sup>s</sup>. The Rights and Incapacities of Bastards at common law; W. C.

#### 1<sup>h</sup>. The Rights of Bastards at common law.

The *rights* of a bastard at common law, in respect of property, are very few, being such only as he *can himself acquire*; for he can *inherit* nothing, being looked upon as the *son of nobody*; and accordingly he is called sometimes *filius nullius*, and sometimes *filius populi*. But although considered *filius nullius*, with respect to inheritance and successions, the illegality of any incestuous matrimonial connexion which he may form is as much noticed, and punished, as if he were legitimate. And although he can *inherit* nothing, not even a *surname*, yet he may gain a surname by reputation, and by that name, or by any other certain and unambiguous designation or description,



may acquire property, real or personal, by grant or by will. It was, indeed, at one time supposed that a limitation to a bastard unborn, and yet *en ventre sa mere*, was void, because it was thought that he could only take by a named gained *by reputation*, which of course could only be after his birth. It is, however, well settled at present that all that is required is simply a description so definite as to ascertain clearly the individual who is intended to be the grantee or devisee. Hence a bastard may take property by his name of reputation; by his acquired character as the acknowledged or commonly reputed child of a certain father; by his description as the *child of his mother*, which is hardly less certain than if he were legitimate; and although he be yet *en ventre sa mere*, by the description of the child of which a designated woman is *enceinte*, provided, in this latter case, there is no reference to the *paternity*. If that element (of the paternity) is introduced into the description, it renders the person intended *uncertain*, and so invalidates the grant or devise. Thus a legacy to "the child of which A (an unmarried woman) is *enceinte*," is certainly good, and one to "the child of which A is *enceinte by me*," is as certainly void. There are cases, however, where the application of this distinction is nice and uncertain. Thus, if a testator says, "Whereas, A is *enceinte by me*, I bequeath to the child of which she is pregnant," such a legacy, the motive of the bequest, and the condition precedent to its taking effect, being the *fact* of his being the *father of the child*, which in law is not susceptible of proof, the legacy fails. But if the language of the will be, "Whereas, *I have reason to believe* that A is *enceinte by me*, I give the child of which she is now pregnant," such a legacy,—the motive of the gift is *his belief*, whether well or ill founded, and the actual fact of his paternity is not drawn in question; and, therefore, the legacy is good. (1 Bl. Com. 459, & n's (19) and (20); 1 Rop. Leg. 177-'8; 1 Th. Co. Lit. 148-'9, and n (H); Metham v. Duke of Devon, 1 P. Wms. 529; Earle v. Wilson, 17 Ves. 528; Wilkinson v. Adam, 1 Ves. & B. 422; Gordon v. Gordon, 1 Meriv. 141, 150, 153; Evans v. Massey, 8 Price, 22.)

On the other hand, a legacy or other gift to the *unbegotten* illegitimate child of a designated woman, even irrespective of the father, is liable to objection on the score of the immoral tendency of such dispo-

It may be proper to remark that in *Stevenson's*  
*Leaves v. Sullivan*, 3 Wheat. 233, the Supreme Court  
of the United States when as yet there had been no

adjudication of Virginia courts upon the statute, interpreted its language as entitling bastards to inherit from the mother only, and not from the *collateral line* on the mother's side, as from a brother of the bastard. But this construction is wholly overruled in the above stated cases of *Garland v. Harrison*, 8 Leigh, 368; and *Hepburn v. Dundas*, 13 Grat. 226-'7; and in *Lessee of Brewer v. Blougher*, 14 Pet. 178, is abandoned by the Supreme Court itself.

For a learned abstract of the rights and disabilities of bastards in different ages and nations, see note by Mr. Wheaton to *Stevenson's heirs v. Sullivant*, 5 Wheat. 262. And for the Roman law on the subject, the reader is referred to Gibb. Decl. & Fall, c. xlv.

Notwithstanding the objections which seem fairly to lie to the doctrines of the common law, touching the disabilities of bastards, yet several of the States of the Union adhere to them in their rigor, and most have stopped considerably short of the provisions of our Virginia law. See 4 Kent's Com. 414-'15; 1 Rop. Leg. 80, n (10).

On the paternal side, the condition of bastards is unchanged in Virginia. As to the father, the bastard is still *quasi filius nullius*; the law indulges no presumption as to his paternity. A devise or bequest to him by his reputed or acquired name, or by a definite designation, is good, whether made by his father or by a stranger; but the well-established common law doctrine is still applicable on the father's side, namely, that the word *children* does not include bastards, even in a will, save where the intention to do so is plain, as where bastards are clearly designated, or when there are no children but bastards, nor any possibility of any. *Ante* p. 418, 1<sup>b</sup>.) On the *mother's side*, however, our statutes have placed him in a very different position. As to her, he does not remain *nullius filius*. It was the object of our law to give him what at common law he had not, a mother. He is *her child* in law, as in fact, and as to her the maxim, "*qui ex damnato coitu nascuntur, inter liberos non computentur*," has ceased to exist. He is to be counted amongst the children of his mother, and as a consequence will take by virtue of a devise or gift to his *mother's children*, just as if he were legitimate. (*Bennett & ux v. Toler & als*, 15 Grat. 631.)

## CHAPTER XVII.

## OF GUARDIAN AND WARD.

1<sup>st</sup> The Relation of Guardian and Ward.

This part of the private relations is nearly allied to that of *parent and child*. The popular idea of a *guardian* implies *oppression*, or at least that the *father* is dead. This, however, is not the legal notion of a *guardian*. On the contrary, the first and most frequent instance of *guardianship* is that of the *minor's parents*. A guardian is defined to be one appointed, by the policy of the law, to take care of a *minor's* person or estate, or of both person and estate. (1 Bl. Com. 460; Bac. Abr. Guardian; 2 Kent's Com. 217.)

The Roman law styles one charged with the custody of a *minor's* person and the care of his education, a *tutor*, and one to whom his estate is committed, a *curator*. Our law unfortunately denominates both sets of fiduciaries *guardians*, thereby giving occasion to not a little confusion of thought. The student, therefore, must take care to fix in his memory, in respect to each class of guardian presently to be described, whether he has charge of the *person only*, or of the *estate only*, or of *both person and estate*. (1 Bl. Com. 360; Dig. xvi, Tit. iv, § 1.)

It is proposed to consider the subject thus:

1st. The different kind of guardians, how they are appointed, and their power and duty, &c.

2d. The different ages of young persons for sundry purposes, as defined by the law; and

3d. The privileges and disabilities of a minor under age, and subject to guardianship;

W. C.

1<sup>o</sup>. The different kinds of Guardians, the Mode of their Appointment severally; the Circumstances under which the several kinds of Wardship occur; the Powers and Duties of Guardians; and Guardian's Accounts and Allowances; W. C.

1<sup>st</sup>. The different kinds of Guardians, and Modes of their Appointment severally.

Under this head will be stated the different kinds of guardians, common law and statutory, existing in England, proceeding to show whether or not they are respectively found in Virginia, together with the modes of appointing them severally.

The several kinds of guardians are (1), Guardians by nature; (2), Guardians for nurture; (3), Guardians in chivalry; (4), Guardians in socage; (5), Guardians by election; (6), Guardians appointed by chancery courts;

(7), Guardians appointed by the Ecclesiastical court; (8), Guardians under the Statute 4 & 5 Ph. & Mary.; (9), Testamentary guardians; (10), Guardians by the custom of particular places; and, (11), Guardians *ad litem*. W. C.

1<sup>st</sup>. Guardians by Nature.

These exist by the common law. They are the *father*; or if he be dead, the *mother*; and if she too be dead, *any lineal ancestor* of the minor, to whom *he is heir*; the father having the first claim, the mother the second; and amongst more remote ancestors, he who first obtains possession of the infant, pursuant to the maxim *in æquali jure melior est conditio possidentis*. (1 Bl. Com. 461.)

Guardianship by nature embraces only the custody of the minor's *person* and the *care of his education*, and does not include the care of his estate. It is applicable only to *heirs apparent*; and when exercised by the father or mother seems, as to the heir apparent, to be little more than the *parental control* treated of in the last chapter. As to infant children other than heirs apparent, this wardship is not applicable to them, but guardianship *for nurture*, presently to be described, until the age of fourteen. After the age of fourteen, during the rest of their minority, the younger children (not heirs apparent), although in general under no *wardship* to their parents, are yet subject to their parental control and authority, which, in its practical effects, seems to differ little, if at all, from a guardianship *of the person*.

The infant's estate, if he has any, is never committed to the guardian *by nature*, merely as such, but to some person duly appointed and qualified as guardian by giving bond, &c., as required by law. (1 Th. Co. Lit. 155, n (2); Bac. Abr. Guardian (A), 1; Ratcliff's Case, 3 Co. 37 b, 38 a b; Armstrong v. Stone & ux, 9 Grat. 105, &c.)

In Virginia *all children*, male and female, without regard to primogeniture, are heirs apparent of father and mother by our statute of *descents* (V. C. 1873, c. 119, § 1), and hence all are with us subject to the guardianship *by nature*, and such guardianship is otherwise attended with the same incidents as at common law. Thus, it extends to the *person only*, and *not the estate*, and continues until the ward attains the age of twenty-one.

In consequence of its embracing *all the children*, we are spared the necessity of considering practically the

question which may arise at common law, as to the effect on the parental authority, in regard to the younger children, of the guardianship *by nature*, applying only to the heirs apparent, and that *for nurture* continuing not beyond the age of fourteen. (1 Tuck. Com. (B. I.) 137.)

The student will not forget that the minor may be taken by the court of chancery out of the hands of a guardian by nature (even though it be a *father*) whenever he is plainly and grossly unfit for it by habits of drunkenness, of blasphemy, of licentiousness, &c.; and that in Virginia this jurisdiction (indubitable, apart from the statute) seems confirmed by it. (V. C. 1873, c. 123, § 13.) The provision is that the circuit, county or corporation courts in chancery "may remove *any guardian* for neglect and breach of trust, and appoint another in his stead, and make any order *for the custody and tuition of an infant*." See authorities formerly cited, and especially 2 Stor. Eq., § 1341, &c.; 2 Rob. Pr. (1st Ed.) 154; *Ante*, p. 399, 1<sup>b</sup>.

#### 2<sup>d</sup>. Guardians for Nurture.

This guardianship is also of common law origin. It occurs only where the infant is *without any other guardian*, applies to those children who are *not heirs apparent*, and continues only until the ward attains the *age of fourteen*. It embraces only the care of the *person*, and *not of the estate*, and belongs only to the father and mother. And when at the age of fourteen it terminates, the *parental authority* appears to remain in full force, as to the subjects of guardianship *for nurture*, until the age of twenty-one. (1 Th. Co. Lit. 155-'6, n (3); Bac. Abr. Guardian, (A), 1.)

In Virginia guardianship *by nature* seems to have superseded guardianship *for nurture* by superseding the occasion for it. (2 Kent's Com. 221; 1 Tuck. Com. (B. I.) 137.)

#### 3<sup>d</sup>. Guardians in Chivalry.

This is a common law guardianship. It was incident exclusively to the tenure of lands by *knight-service*, or chivalry; and occurred only where the infant was seised *by descent* of lands holden by that tenure.

The wardship belonged to the *lord of the fee*, of whom the lands were holden, and included not only *the infant's person*, but also such of his lands as were within the guardian's seignory; and where the king was the lord, it included the *whole of the infant's estate*, of whomsoever holden, whatever the tenure, and whether lying in tenure or not.

The wardship applies to such *male heirs* as, at the ancestor's death, were under twenty-one, and to such *female heirs* as were then under fourteen; continuing, *as to males*, until twenty-one, and *as to females* until sixteen or marriage, having the preference, with respect to the custody of the infant's person, over every other species of wardship, except only *that of the father*, in case of his *heir apparent*,—even the mother being postponed.

The incidents of this wardship were very remarkable and very oppressive. Thus it was for the *benefit of the lord*, who enjoyed the infant's estates in his hands, *without accountability for profits*, being only obliged to *maintain the ward*. And the lord was also entitled to the *marriage of the ward*—that is, to as much as he could get for the alliance; and if the ward refused, he forfeited the *value of the marriage* to his guardian. The nature and explanation of these incidents are set forth by Blackstone (2 Bl. Com. 67-'8), to which the student is referred. See 2 Inst. Com. & Stat. Law, c. V.

Wardship in chivalry ceased with the tenure out of which it arose—namely, by Stat. 12 Car. II, c. 24. A short history of it, showing why the English people endured it so long, the devices resorted to in order to mitigate its oppressiveness, and the slow decline of it before it was finally abolished by 12 Car. II, c. 24, is given very interestingly by Mr. Hargrave, 1 Th. Co. Lit. 152, n (1); see also Ratcliffe's Case, 3 Co. 37 b, n (A); Bac. Abr. Guard'n (A), 1.)

There never was any tenure by chivalry in Virginia. All our lands were granted by the Crown, to be held "in free and common socage, as of the king's manor of East Greenwich." And consequently there was never in Virginia such a guardianship as that in chivalry.

#### 4<sup>s</sup>. Guardians in Socage.

This guardianship exists at common law, as an incident to lands held by *socage tenure*. It occurs where the infant is seised *by descent* of lands or other hereditaments holden by that tenure, and is conferred on the *next of kin* to the infant, who cannot *possibly inherit* the lands from him, a precaution adopted in order to remove from the guardian all temptations to employ foul means to clear the way to his own succession. (1 Bl. Com. 461; 1 Th. Co. Lit. 168, n (14).)

Unlike guardianship in chivalry, it is in no respect for the profit of the guardian, but exclusively for the



*benefit of the ward.* It is therefore neither a subject of alienation, nor succession to the personal representative, as guardianship in chivalry was; and the guardian must account for all the profits of the ward's estate.

Although it exists as incident to *tenure*, it draws to it the custody of the ward's person, and of his personal property, as well as of his socage lands; but it continues with either sex only till the ward has attained the age of fourteen.

The socage tenure being the tenure by which, since 12 Car. II, c. 24, the great body of the lands in England are holden, this species of guardianship is far the most frequent of all at common law, in respect to infants who have no father living.

In Virginia, where, prior to the Revolution, all the lands were granted by the Crown, to be held in free and common socage, this guardianship was so universal that it was not until 1850 that our statutes ceased to recognize it as still subsisting. It was, however, impossible for it to occur after 1779, when all feudal tenures were abolished (10 Hen. Stat. 64; 2 Inst. Com. & Stat. Law, 74-'5); and upon the adoption of the Statute of Descents (V. C. 1863, c. 119, § 1), to take effect 1st January, 1787, there was a further reason why it could not exist with us—namely, that by our law of descents there is no next of kin who cannot by possibility inherit.

#### 5<sup>a</sup>. Guardians by Election.

The power of an infant to choose a guardian, arises at common law only when the infant is without any other legal guardian of his person and estate.

This may happen either before or after the age of fourteen, but it is apprehended that if under fourteen the infant is not permitted to choose a guardian, but that the court of chancery must appoint him one,—at all events to take charge of his estate. His person, at common law, might be, if he were an heir apparent, under his guardian by nature, or if not an heir apparent, under a guardian for nurture. (1 Bl. Com. 463; Bac. Abr. Infancy, (A); 1 Th. Co. Lit. 157, n (6), 168.)

The election of a guardian is, in England, often made before a judge on the circuit, and Mr. Hargrave mentions an instance of Lord Baltimore, at the age of eighteen, making the election of a guardian for some purpose connected with his proprietary government of Maryland, by deed, upon the advice of two eminent barristers. (1 Th. Co. Lit. 157-'8, n (6); 1 Bl. Com. 462, n (8).)

This guardianship must be considered as of common law origin, because it arises out of no statute; and yet its existence appears to date *from a comparatively recent period*. It is noticed by no writer except Swinburne, in his Treatise on Testaments, before Lord Coke, and by the latter it is apparently not recognized as strictly legal. (1 Bl. Com. 462, n (8); 1 Th. Co. Lit. 157, v (6), 168.)

This guardianship embraces *the property as well as the person* of the ward, and continues until twenty-one.

Guardianship by election exists in Virginia—that is, a minor *over the age of fourteen* may nominate his guardian to the circuit, county, or corporation court, either personally, or in writing, acknowledged before a justice. But if the court does not approve the nomination, it may appoint some one else. (V. C. 1873, c. 123, § 4; Ham v. Ham, 15 Grat. 75 & seq.) The wardship results, therefore, not so much from the election of the infant as from the *appointment by the court*, so that this sort of guardian may be considered with us as identical with that *appointed by the chancery court*, which is to be next described.

6<sup>s</sup>. Guardians appointed by the *Chancery Court*.

How the court of chancery in England acquired this branch of its jurisdiction is not agreed amongst English lawyers, although that it exercises it without dispute is a matter of daily experience. Mr. Hargrave insists that although unquestionable even in his day, it was yet at first an *usurpation*, originating about the year 1696, and having no better excuse than that the case was not sufficiently provided for otherwise. The King is admitted, as *parens patriæ* and the universal protector of his subjects, to be entitled to the supreme guardianship of all infants, even though they may have other guardians, or although the parents be living; and it is said that the chancellor exercises this portion of the royal functions by delegation from the crown. Indeed, it is a general maxim, as we have seen, that the court of chancery possesses a general power to intervene in behalf of such persons as are unable to protect themselves. (1 Bl. Com. 462, n (8); 1 Th. Co. Lit. 158, n (6); 2 Stor. Eq. § 1351, 1333; Fonbl. Eq. B. II, Pt. II, c. 2, § 1, n (a); Eyre v. Countess of Shrewsbury, 2 P. Wms. 123-'4 )

The wardship in this case embraces *both person and property*, and continues until the *age of twenty-one*.

In Virginia, the power to appoint guardians is explicitly conferred, by statute, upon the *circuit, county*

*and corporation courts*, and, as it is understood, in their capacity as *courts of chancery*. (Ficklin v. Ficklin, 2 Va. Cas. 204.) "The circuit, county, and corporation courts," says the statute, (V. C. 1873, c. 123, § 3, 4,) "of any county or corporation in which *any minor resides*, or if he be resident out of the State, in which *he has any estate*, may appoint a guardian for him, unless he have a guardian appointed by his father." "If the minor is under the age of fourteen years, the court may nominate and appoint his guardian; if he is above that age, he may, in the presence of the court, or *in writing*, acknowledged before a justice, nominate his own guardian, who, *if approved by the court*, shall be appointed accordingly; and if the guardian nominated by such minor shall not be appointed by the court, or if the minor shall reside without the State, or if, after being summoned by the court, he shall neglect to nominate a suitable person, the court may *nominate and appoint* the guardian in the same manner as if the minor was under the age of fourteen years." But let it be observed that the appointment thus of a guardian by the chancery court does not prejudice the right of the father, as guardian *by nature*, to the custody of the ward, and the care of his education; nor if the father be dead, does it prejudice the like claim on the part of the mother, as long as she continues unmarried and is fit for the trust. (V. C. 1873, c. 123, § 7.)

The statute does not in so many words declare just here that the courts above named exercise the function of appointing a guardian, in their capacity as *courts of chancery*, but it has been so decided judicially (Ficklin v. Ficklin, 2 Va. Cas. 204; Durrett v. Davis, 24 Grat. 302); and in that capacity *expressly* they are empowered (V. C. 1873, c. 123, § 13,) to "hear and determine all matters between guardians and their wards, require settlements of the guardianship accounts, remove any guardian for neglect or breach of trust, and appoint another in his stead, and make any orders for the *custody and tuition of an infant*, and the management of his estate." (See V. C. 1873, c. 123, § 13.)

Mention is often made in the English books of what are called "Wards of the Courts of Chancery." They are minors who, either by petition direct, or in the course of litigation touching their estates, are taken under the *immediate and special* protection of the court, which either appoints a guardian for the minor, or imposes upon an existing guardian such terms as in its discretion may seem fit. To marry, or to be concerned

in bringing about the marriage, of an infant ward of court without its consent, is a contempt which is visited with highly penal consequences, including sequestration of the party's property, imprisonment, &c. (Bac. Abr. Guardian, (C); 1 Tuck. Com. (B. I), 141.) A settlement on the wife of her own fortune, at least, or part of it, and if the husband is possessed of an estate, of part of his, is invariably required, regard being had to the circumstances of aggravation or extenuation which mark the particular case. (Stevens v. Savage, 1 Ves. Jun'r, 154, & n (1); Stackpole v. Beaumont, 3 Ves. Jun'r, 48, & n (2); Bathurst v. Murray, 8 Ves. 64, & notes; Nicholas v. Squire, 16 Ves. 260, & n (2).)

The doctrines of the English chancery touching this subject have not as yet been practically applied in Virginia; and it is not easy to determine in advance whether, when occasion arises, they will be adopted entire or with modification. It may be conjectured, that as marriage settlements are not frequent with us, nor much favored by the general sense of society, there will probably be less rigor evinced than has been manifested in England, to secure a large separate provision for the wife.

7<sup>s</sup>. Guardians by Appointment of the Ecclesiastical Court.

The cases in which the ecclesiastical courts in England may appoint guardians, or whether they can legally appoint them at all, and the extent of the guardian's authority, are so ill-defined that it is needless to do more than to mention the guardianship as one supposed sometimes to exist in England. To this class of guardians belong those mentioned by Blackstone, as assigned by the *Ordinary* (the judge of the *Bishop's Court*), in default of father and mother. (1 Bl. Com. 461; 1 Th. Co. Lit. 159, n (6).)

As we have no ecclesiastical courts in Virginia, of course there can be no such guardianship here.

8<sup>s</sup>. Guardians under the Statute 4 & 5 Ph. & Mary, c. 8.

The *direct object* of the statute 4 & 5 Ph. & M., c. 8, was to punish and prevent the taking away and marrying of maidens under sixteen years of age, without consent of their parents, or of the persons to whom the father had temporarily committed them. But the statute prohibited the act in terms which *implied* that the *custody and education* of such females belonged to the *father and mother*, or to the *person appointed by the father*. And accordingly, it is construed to constitute the individuals thus contemplated, the guardians

of the persons (but not of the estates) of females under sixteen, even, it is said, though they be *natural children*. (1 Bl. Com. 461; 1 Th. Co. Lit. 156, n (4).)

We have in Virginia a statute of nearly corresponding import to that of 4 & 5 Ph. & Mary. c. 8 (V. C. 1873, c. 187, § 17; Id. c. 188, § 18), but with us there is no occasion for the inference drawn by the English courts, because parents are here guardians *by nature* of all their children until the age of twenty-one years. See 1 Tuck. Com. (B. I), 138.

9<sup>a</sup>. Guardians appointed by Fathers, or *Testamentary Guardians*.

When, upon the restoration of Charles II to the throne, in 1660, it was determined to abolish the *chivalry* or *knight service* tenure of lands, with its oppressive incidents, and amongst the rest, *guardianship in chivalry*, it was deemed necessary to substitute some other wardship in room of that to be abolished, continuing it until the minor should attain his full age of twenty-one years, and causing it to apply as well to property as to person. Accordingly, the Statute 12 Car. II, c. 24, which took away the chivalry tenure and its incident of wardship, enabled a father, by *deed or will*, to appoint who should be guardians of his infant children. The father was allowed by the statute to exercise this power, though he himself were under twenty-one; to apply it to all his children under twenty-one, or unmarried at his decease, or *born after*; to appoint whom he pleased, except a Popish recusant; to make the appointment to take effect in possession or remainder, and to last until the ward was twenty-one, or for any less time; and the appointment was declared to be effectual against all claiming as guardians in socage or otherwise, and to clothe the guardian so appointed with the custody and control of *both the person and property* of the ward. (1 Bl. Com. 462, & n (7); 1 Th. Co. Lit. 156-7, n (5); Bac. Abr. Guard'n (A.), 3.)

The statute of Virginia corresponding to 12 Car. II, c. 24, is very like it in its import and effect. It enacts (V. C. 1873, c. 123, § 1) that "every father may, by his *last will and testament* (but not *by deed*), appoint a guardian for his child, born or to be born, and for such time during its infancy as he shall direct." See Kevan v. Waller, 11 Leigh, 428, &c.

The guardian cannot as ign his interest, because it is coupled with a personal trust and confidence in the

guardian himself; and for a like reason it is not transmitted to his personal representative. However, if two or more are made guardians, and one of them dies or declines to qualify, the *trust survives*, not merely for the technical reason that it is coupled *with an interest*, but also because it is expedient for infant wards that that construction should be adopted. In order to constitute a testamentary guardian, no particular form of words is prescribed, but the language must clearly indicate such to be the testator's intent. Thus, a devise to one in trust for a child's *maintenance and education* does not constitute the trustee a testamentary guardian, neither does a request that a designated person shall *direct the child's education*; nor a provision that the executor shall invest certain funds, and that the child, out of the proceeds, shall be *educated in the best manner under the direction of the executor*. (Bac. Abr. Guard'n (A.), 3; Eyre v. Countess of Shaftsbury, 2 P. Wms. 104, 107-'8; Beaufort v. Berty, 1 P. Wms. 702; Kèvan v. Waller, 11 Leigh, 428, &c.; Gaines v. Spann's Ex'ors, 2 Brock. 88.)

With us, the appointment by the father of a testamentary guardian does not supersede the mother's right as guardian *by nature* to the custody of the child's person and the care of his education while she remains unmarried and is fit for the trust. (V. C. 1873, c. 123, § 7; Mellish v. DeCosta, 3 Atk. 14.)

Natural children are not within this statute. The putative father of a bastard cannot by his will appoint a guardian for him; but except as against *the mother*, the court of chancery will adopt the father's nomination, unless it appear that some objection exists to the person named. (Bac. Abr. Guard'n (A), 3.)

A *mother* is not empowered by this statute to appoint a guardian, and consequently her appointment is void. So also, for the same reason, is an appointment *by a grandfather* as to a grandchild; although in either case, if the infant be left an estate on condition that the person named as guardian be allowed to act as such, if the father refuse to assent to it, it works a forfeiture. (Bac. Abr. Guard'n (A) 3.)

#### 10<sup>s</sup>. Guardians by the Custom of Particular Places.

This species of guardianship is exemplified in England by the custom of the city of London and of the county of Kent. Thus, by the special custom of London, the wardship of *orphans* under age and unmarried belongs to the city; and by the special custom of the county of Kent, the lord of the manor may commit

the guardianship of his tenant's *infant heir* to the next relation in the court of justice within whose jurisdiction the land is, the lord being answerable for the guardian's fidelity.

The nature and extent of this guardianship, as to what age it continues, and whether it embraces the care of the estate as well as the custody of the person, are to be determined by the custom itself. (1 Th. Co. Lit. 157, n (6); Bac. Abr. Guard'n (A) 2; Id. Customs of London (B).)

In Virginia there can be no special custom of particular places (that is, in the sense of a *local law*), for a reason which has been stated (*Ante* Vol. I. p. 34), and, therefore, there cannot be with us such a guardianship as this. (Harris v. Carson, 7 Leigh, 632; Mason v. Moyers, 2 Rob. 606.)

11<sup>s</sup>. Guardians *ad litem*.

A guardian *ad litem* is one appointed for an infant to defend him in any action or suit brought against him. In all *civil actions or suits* every court, where an infant is sued, has power to appoint a guardian *ad litem* to conduct his defence in that case, the appointment having to be renewed in every separate case, the infant having no discretion to select an attorney to represent him. And so necessary is the appointment of a guardian *ad litem* esteemed, that although the process against an infant is issued and executed against him just as against an adult, and the declaration or bill setting forth the complaint is framed and filed in like manner, yet after the declaration or bill is filed, no rule nor any proceeding whatever can be had *lawfully* until a guardian is designated; and any step that is taken will be void as to the infant. However, if an infant be fully defended by his testamentary or regularly appointed guardian, the acquiescence of the court is equivalent to the appointment of such person as guardian *ad litem*.

In *criminal* proceedings infants defend like adults, and it is error for a minor to plead to a criminal prosecution by a guardian *ad litem*. He ought to appear and make defence like an adult, either in person or by attorney. (Word's Case, 2 Leigh, 653.)

But whilst it is error *in a civil case* for a minor to appear by attorney, yet in the interest of the minor himself, it is in Virginia provided by statute (V. C. 1873, c. 177, § 3) that "no judgment or decree shall be stayed or reversed for the appearance of either party, being an infant under the age of twenty-one



years, by attorney, if the verdict (where there is one), or the judgment or decree, be for him, and *not to his prejudice*." See 1 Th. Co. Lit. 159, n (6); 171, n (29); 1 Rob. Pr. (1st Ed.) 172-'3; Bac. Abr. Guard'n (A) 4; Fox & al v. Cosby, 2 Call 1; Roberts v. Stanton, 2 Munf. 129; Brown v. McRae's Ex'ors, 4 Munf. 429; Beverlys v. Miller, 6 Munf. 99; Word's Case, 3 Leigh, 743.

Where there is no such guardian, any judgment or decree against the minor may be reversed and annulled by the same court which pronounced it, at common law, upon a writ of error *coram vobis*, and in Virginia on *motion* simply, after reasonable notice. (V. C. 1873, c. 177, § 1; Watts v. Cole, 2 Leigh, 653.)

It has been questioned whether at common law a guardian *ad litem* can be *compelled to serve*; but in Virginia this doubt is resolved by a statute (V. C. 1873, c. 167, § 16), which expressly declares that "the court in which any suit is pending, or the clerk *at Rules*, may appoint a guardian *ad litem* to any infant or insane defendant, whether such defendant has been served with process or not. The court *may compel* the person so appointed to act, but he shall not be liable for costs, and shall be allowed his reasonable charges, which the party on whose motion he was appointed (who is usually the plaintiff) shall pay." (Wells' Heirs v. Winfree, 2 Munf. 342.)

As to the powers and duties of guardians *ad litem*, they are confined to the defence of the suit in which the guardian is appointed. And even in that suit, it is a settled rule that no answer or admission of his shall prejudice the infant, or be proved against him for any purpose. (Bac. Abr. Guardian (A), 4; Bank of Alexandria v. Patton, 1 Rob. 500, 535.)

## 2<sup>d</sup>. The Circumstances under which the Several Kinds of Wardship Occur.

It appears from the foregoing account of the several species of guardians that *of the eleven* existing in England, we have in Virginia *only five*; viz:

1. Guardians by Nature;
2. " by Election;
3. " by Appointment of the Chancery Court;
4. " by the Father's will; and
5. " *ad litem*;

and that of these five *three* are charged with the *care of the ward's estate*, and give *bond and security* accordingly, viz:

1. Guardian by Election;
2. Guardian by Appointment of Chancery court; and
3. " by Father's will;—

it being provided that if in either of these cases the court shall omit to require a bond before the guardian is allowed to qualify (unless, in case of a *testamentary guardian*, the will shall so direct), or if it accept as sureties such persons as do not satisfy it of their sufficiency, the judge is himself liable to the infant for any loss ensuing; and until such bond is given, a temporary guardian, under the name of *curator*, may be designated by the court, who may be permitted to qualify, in the discretion of the court, without security. (V. C. 1873, c. 123, § 2, 5, 6; Id. c. 12, § 6.)

Let us now see when one or the other of these several kinds of guardianship occurs.

If there be a *father*, he is guardian by *nature*, and as such is charged with the custody of the *child's person*, and with his *education*, but not *with his estate*, which can only be committed to such parent, or to some other person, by virtue of an *appointment by the court*, and giving bond, &c. He may, on the other hand, be deprived by a *court of chancery*, in its discretion, even of the custody of the child's person, if he shall seem *grossly unfit* for it. (Bac. Abr. Guard'n (C); 2 Stor. Eq. § 1341 & seq; V. C. 1873, c. 123, § 13.)

If the father be dead, the mother succeeds, as guardian *by nature*, to the care of the *infant's person*, and the conduct of his *education*; and she thus succeeds notwithstanding there be a guardian by the father's will, or by appointment of the chancery court, while she remains unmarried, and is fit for the trust. (V. C. 1873, c. 123, § 7; *Armstrong v. Stone & ux*, 9 Grat. 105-107.) And in the absence of a testamentary or chancery guardian, the mother's guardianship *by nature* prevails, although she be married again. (*Villa Real v. Mellish*, 2 Swanst. 533. *Pottinger v. Wrightman*, 3 Meriv. 67, 79; *Armstrong v. Stone & ux*, 9 Grat. 105.)

A testamentary guardian, and a guardian elected by the ward, or appointed by the court, are entitled generally to the care of the *ward's person and estate*; but the father and mother are for the most part not thereby divested of their parental control. (V. C. 1873, c. 123, § 7.)

The wardship may be terminated before the minor attains his age of twenty-one years, by the guardian's death, by his resignation (with consent of the court which appointed him), by his removal by the court of chancery, for neglect or breach of trust, or in case of a testamentary guardian, by the lapse of the period assigned

in the will for its duration. But the ward is not at liberty (as has been sometimes thought), after the age of fourteen, to change at pleasure even a guardian previously nominated by himself, and *a fortiori* not one designated by his father's will, &c. Good cause must exist for the change, in order to justify it, and courts ought by no means to be indulgent in hearkening to' such applications. (Bac. Abr. Guardian (E); Bradshaw v. Bradshaw, 1 Russ. (1\* Eng. Ch.) 528; Newell's case, 1 Johns. C. R. 25; Ham v. Ham, 15 Grat. 74; V. C. 1853, c. 123, § 7, 13.)

If the guardian does not die nor resign, and is not previously removed, or in case of the testamentary guardian, if the period named in the will does not expire first, his office terminates (V. C. 1873, c. 123, § 7) as to *male wards* at twenty-one, and as to *female wards* at twenty-one, or marriage. This statutory provision in respect to *female wards* is merely declaratory of the common law, which holds marriage to put an end to the guardianship, and to transfer to the husband, if adult, and if not, to the husband's guardian, the care of her estate, and to the husband *in all cases* the custody of her person. As to *male wards*, the common law holds marriage to emancipate the person, but still to leave the estate, including that of the wife, in the care of the husband's guardian. And this probably will be the construction of the statute, since it is hardly compatible with the relation of husband and wife that the *husband's person* should be subject to the control of another. (Guerrant v. Hooker, 7 Leigh, 366; Mendez v. Mendez, 1 Ves. Sen'r, 91; Roach v. Garvan, Id. 159-'60; Reeve's Dom. Rel. 328; Bac. Abr. Guardian (E); 2 Kent's Com. 225; Eyre v. Countess of Shaftsbury, 2 P. Wms. 123.)

It should be observed that the authority of a guardian (except of a guardian *by nature*, if, indeed, that be an exception) extends not, by the common law, beyond the jurisdiction under which he received his authority, although many of the continental jurists hold otherwise. It is settled, however, that a Virginia guardian has, in general, no authority outside of Virginia, nor has a guardian, appointed in England, Canada, or Mississippi, any power in Virginia. (Stor. Confl. L. § 495, &c., 504, 504 a, &c.) However, this principle has proved so inconvenient in practice as to lead to the enactment of a statute which provides that where any minor (and the same principle is applied in the case of *insane persons*) entitled to money or property in this State, resides out of

it, on the petition of a guardian of such minor, lawfully appointed and qualified in the *State or country* of his residence, the circuit or corporation court of the county or corporation in which the estate may be, may order the delivery of such personal property, &c., to the foreign guardian, including the accruing rents of his real estate, to be removed to the State or country where he qualified, with certain precautions against abuse and against prejudice to the interest of the minor. (V. C. 1873, c. 125; § 3 to 5, 8, 9; Id. c. 154, § 7, 38.)

### 3<sup>d</sup>. The Powers and Duties of Guardians.

The fundamental principle touching this subject is that the guardian's office is one of obligation and duty for the benefit of the ward, and not of speculation and profit for his own aggrandizement. He cannot *lawfully* reap any advantage from the use of the ward's money. He cannot lawfully act for his own emolument in any contract, or purchase, or sale, as to the ward's property; but in all that he does the law obliges him to consult the ward's interest alone, and whatever profits arise from transactions with or concerning the minor's estate, redound in law to the minor, and not to the guardian. (2 Kent's Com. 229; Bac. Abr. Guardian (G).)

The powers and duties of guardian are summed up in two particulars—namely, (1), The *custody of the ward's person* and care of his education; and (2), The *care and management of his estate*;

W. C.

### 1<sup>st</sup>. The Custody of the Ward's Person, and Care of his Education; W. C.

#### 1<sup>a</sup>. *Right to the Custody of the Ward's Person and the Care of his Education.*

In these particulars the power and reciprocal duty of guardian and ward are very *similar* to those prevailing between *parent and child*; but they are not exactly the *same*; for a guardian, as he can do nothing but for the benefit of the infant, so he has no private interest as a parent, or at least as a father has, in his ward's services and earnings. He cannot recover for such services, nor can he maintain an action *in his own name* for the seduction of a female ward, nor for any injury to the ward's person. But see Bac. Abr. Guardian (F); *Fernsler v. Moyer*, 3 Watts & Serg. (Pa.) 416.

The guardian's right to the custody of the ward's person is undeniable, as it is also to the care of his education, in respect to which a court of chancery will assist him, if need be, with all its powers. (2 Stor.

Eq. § 1340; Hill v. Turner, 1 Atk. 516; Hall v. Hall, 3 Atk. 721; Tremain's Case, 1 Stra. 167.) And this authority, at least in guardians appointed by the court and by the father's will, and in the father and mother as guardians *by nature*, is pretty distinctly recognized with us by statute. (V. C. 1873, c. 123, § 7.)

It is the duty of a guardian to protect and defend his ward, and he is justified in assisting him to obtain redress for any wrong done him. He is also required to provide, out of the *profits* of the ward's estate (and sometimes out of the *principal*), for his maintenance and education; and when his estate is not sufficient for this purpose, it is the guardian's duty, if the ward's age and health admit, and a suitable person will take him, to *bind the ward apprentice*, with the consent of the court of the county or corporation, if the child be under fourteen, and if over fourteen, with his own consent; or, with like consent, to place him in some incorporated asylum for destitute children. But the guardian is in no case *personally* responsible for his ward's support and education, unless by agreement. (V. C. 1873, c. 123, § 7, 8; Id. c. 122, § 1, 2; Barnum v. Frost's adm'r, 17 Grat. 398.) It is the guardian's duty also to control that most important interest of the ward, *his marriage*, no license therefor being obtainable without his consent. (V. C. 1873, c. 104, § 3.) And therefore a guardian is justified in stopping his ward's elopement, and detaining his clothes if he has eloped. (1 Bl. Com. 463, n (9); Barker v. Taylor, 1 Carr. & P. (11 E. C. L.) 101.)

As to the removal of the ward from the country by his guardian, it is not necessarily inadmissible, if it seem to have been dictated by no bad motive, nor likely to be attended with ill consequences; but the act is regarded with jealousy and distrust by a court of equity, and not a little quickens the disposition of the court to intervene and to exert its extraordinary power of taking the infant from the custody of the guardian altogether. And on the other hand, *in no case whatever* will the court make an order for taking an infant out of its jurisdiction. (2 Stor. Eq. § 1339; 2 Kent's Com. 220, n (d); Creuze v. Hunter, 2 Bro. C. C. 500, *note*; DeManneville v. DeManneville, 10 Ves. 52; Mountstuart v. Mountstuart, 6 Ves. 363; People v. Mercien, 8 Pai. (N. Y.) 47.)

2<sup>b</sup>. Remedies for the Abduction of the Ward.

The only injury which a guardian can personally

suffer in his *tutorial capacity or relation*, is by the *abduction* of his ward. For this wrong, the law affords *five remedies*, four of which are the same as in case of a parent similarly aggrieved, which having been already explained, will be merely stated, along with their general effect respectively:

W. C.

1. *Action of Trespass vi et armis.*

This action is adapted to recover *damages* for the wrong, but not to regain possession of the *person* of the ward. (1 Bl. Com. 463, n (9); Bac. Abr. Guard'n (F); Hussey's Case, 9 Co. 72 a; Rex v. Smith, 2 Stra. 952.)

2. *Writ de Custodia Terra et Haredis.*

This is denominated the *writ of Right of Ward*, and lay, at common law, for a guardian in *chivalry* and in *socage*. Thereby the guardian recovered the custody of the ward's body, and of *his lands*; but if, meanwhile, the ward had been married, the body was not recoverable, and this writ lay not; the guardian being then driven to the action of trespass, wherein he recovered, besides other damages, the *value of the marriage*. This, however, was remedied by Stat. of Merton, 20 Hen. III. c. 6, which restored the benefit of the writ of right of ward. (1 Th. Co. Lit. 338, & n (C); 3 Bl. Com. 141; Bac. Abr. Guard'n (F).)

As we have no tenures in Virginia, either chivalry or socage, this remedy is supposed not to exist here.

3. *Writ of Ravishment of Ward.*

By this writ, given by Stat. Westm. II, 13 Edw. I, c. 35, it recovered the *body of the ward*, together with damages for the taking and detention, and not *damages only*, as by the action of trespass at common-law. The benefit of the statute is not restricted to any particular class of guardians, and it may be employed certainly, not only by guardians in *socage*, but also by testamentary guardians, and guardians *by nature*. (1 Th. Co. Lit. 338; Bac. Abr. Guardian, (F); 1 Bl. Com. 463, n (9); 3 Bl. Com. 141; Hussey's case, 9 Co. 72, 74 b; Eyre v. Countess of Shaftsbury, 2 P. Wms. 122.)

The writ of *ravishment of ward* being a *remedial writ*, granted by a *general statute* of England, prior to 4 Jac. I, and not repealed in Virginia, is reserved for the use of our people. (V. C. 1873, c. 15, § 2.)

4. *Writ of Habeas Corpus.*

This writ is adapted to *recover* a ward only when



it is too young to exercise *any will* as to the person in whose custody it would be. In that case, as the custody of one who has no right to it is illegal, and the child has no discretion to express any consent, the writ of *habeas corpus* is adapted to liberate him from that wrongful custody, and the court then is obliged to determine whose is the rightful possession, because that of anybody else would be *illegal confinement without the consent of the party*. But it will be observed, that if the ward have attained the age of consent (which is probably fourteen), and is detained under an allegation of wardship *against his will*, the writ of *habeas corpus* is still adapted to *liberate him*, but not to *restore* him to his rightful guardian. The writ will simply discharge him, and leave him at liberty to go whither and with whom he pleases. (Rex v. Clarkson, 1 Stra. 449; Rex v. Smith, 2 Stra. 982; R. v. Delaval, 3 Burr. 1434; *Ex parte Pearson*, 4 J. B. Moore, (16 E. C. L.) 366; Skinner's case, 9 Do. (17 E. C. L.) 278; King v. Greenhill, 4 Ad. & El. (31 E. C. L.) 624; King v. Isley & ux, 5 Ad. & El. (31 E. C. L.) 441; *In re Hakewell*, 12 Com. B. (74 E. C. L.) 223; *Ex parte Witte*, 13 Com. B. (76 E. C. L.) 680; Armstrong v. Stone & ux, 9 Grat. 102.)

5<sup>1</sup>. Bill in Chancery.

The bill in chancery is the most usual, direct and eligible remedy to try the right of wardship. (2 Stor Eq. § 1340; De Manneville v. De Manneville, 10 Ves. 52; *Ex parte Skinner*, 9 J. B. Moore, 278; People v. Chegray, 18 Wend. 637; Armstrong v. Stone & ux, 9 Grat. 105-'6.)

2<sup>s</sup>. The Care and Management of the Ward's Estate.

The possession, care, and management of the ward's estate, real and personal, are confided to three classes of guardians, as we have seen, namely: the guardian *by election*, the guardian *by appointment of the chancery court*, and the guardian *by the father's will*; and at the expiration of his trust, such guardian is to deliver it all to those entitled, and to account for the profits.

In consequence of his *right to the possession*, he may and ought to sue in *his own name* for any trespass or injury done to the ward's property, although whatever damages he may recover he must account for to the ward. He may, indeed, in an action for ejectment (which theoretically is an action of *trespass*), recover the possession of the ward's lands from the *ward himself*, against whom also he may, as guardian, justify



his possession. On the other hand, the ward (not being entitled to *the possession*) can maintain no action of trespass for any trespass committed on his lands or other property; but all such wrongs must be compensated to him by the guardian, who might and ought to have recovered therefor. (V. C. 1873, c. 123, § 7; 2 Kent's Com. 228; 2 Stor. Eq. § 1356, &c.; Truss v. Old, 6 Rand. 559-60; Lemon v. Harnsbarger, 6 Grat. 301; Sillings v. Bumgardner, 9 Grat. 273; Eyre v. Shaftsbury, 2 P. Wms. 122.) But whilst the guardian is thus, by virtue of his possession, to sue in his own name for trespasses committed on the ward's lands or other property, a second guardian is not to undertake to sue in his own name to call a former guardian to account for his transactions as such guardian; but the bill ought to be filed in the name of the ward by his *next friend*, who may be the guardian for the time being, but may also be any other person approved by the court. And so, in order to get possession at first of ward's estate, if a suit be needful, it should be not in the name of the guardian, but of the infant by his next friend. (Lemon v. Harnsbarger, 6 Grat. 301; Sillings v. Bumgardner, 9 Grat. 273.)

In managing the ward's property the guardian's discretion is pretty large, always subject to his accountability, of course.

He may not, indeed, sell *the lands*, save in pursuance of statute, by proceedings in the *circuit or corporation court* in chancery, when the court shall be satisfied by impartial testimony that the interest of the ward will be promoted by such sale; in which case the proceeds are to be invested under the direction of the court, and so much thereof as may remain at his death *intestate*, shall, if he continue till his death *incapable of making a will*, pass to those who would have been entitled to the land if it had not been sold. (V. C. 1873, c. 124, § 2 to 7, 9, 10, 12; 1 Tuck. Com. (B. I) 142-3; 2 Kent's Com. 228; Field v. Schieffelin, 7 Johns. C. R. 150; Garland v. Loving, 1 Rand. 396; Talley v. Starke, 6 Grat. 339; Cooper v. Hepburn, 15 Grat. 551; Faulkner v. Davis, 18 Grat. 675; Vanghan v. Jones, 23 Grat. 444.)

But although the guardian may not *sell* the lands, save in the manner prescribed, he may *make a lease* of them to continue *during the wardship*, and may dispose of the *annual proceeds* at his discretion, whether he leases or cultivates them himself, accounting for whatever he does or ought to receive. (1 Bl. Com. 463, n

(9); 2 Lom. Dig. 124; Ross v. Gill & ux, 1 Wash. 90; Genet v. Talmadge, 1 Johns. C. R. 5; Ross v. Gill, 4 Call. 258; Roe v. Hodgson, 2 Wils. 135; Bac. Abr. Leases (I), 9; Id. Guardian (G).)

He is liable for any *waste* done (but *not for waste suffered*) by him on the ward's lands; and if the waste be *wanton*, he must pay *treble damages* therefor (V. C. 1873, c. 133, § 3, 4); for which, if suit be brought by the infant during *minority*, it ought to be brought, like all other suits during that period, through his *next friend*. (Eyre v. Shaftsbury, 2 P. Wms. 119; Lemon v. Harnsbarger, 6 Grat 301; 1 Bl. Com. 163, n (9); 1 Rob. Pr. (1st Ed.) 501; V. C. 1873, c. 133, § 3, 4.)

As to the ward's *personal estate*, the guardian has authority to sell any part or the whole of that (subject to his accountability), whether it be perishable or not, and will confer a good title on the purchaser, unless the sale be *fraudulent*, and the purchaser *collude with the guardian* by co-operating in the fraud,—a principle which holds in dealings with all fiduciaries. (Dodson v. Simpson, 2 Rand. 294; Truss v. Old, 6 Rand. 588; Broaddus v. Rosson, 3 Leigh, 12; Bank of Va. v. Craig, 6 Leigh, 399; Field v. Schieffelin, 7 Johns. C. R. 152; Fisher v. Bassett, 9 Leigh, 119; Pinckard v. Woods, 8 Grat. 140; Hunter v. Lawrence, 11 Grat. 111.) And it may be observed further, that the guardian's sureties are liable only for so much as he has received in his capacity as guardian, which must be judged of by his acts and contemporaneous declarations. Thus, if the guardian be also executor, in which latter capacity he originally got possession of the property in question, that possession *as executor* is presumed to continue until the contrary appears; and so one or the other set of sureties is made liable accordingly. (2 Rob. Pr. (1st Ed.) 377.) And a bond given by the guardian to the ward, although *prima facie* evidence against the sureties is no satisfaction of the claim, nor discharge of the sureties. (Hamlin's Adm'r v. Atkinson, 6 Rand. 574.)

In general the acts of a guardian, even though without authority, yet if beneficial to the ward, will be protected, whilst so far as they are otherwise they will be avoided; so that, as a general rule, whatever trust arises will follow the *actual interest of the infant*. (Bac. Abr. Guard'n n (G); Milner v. Harewood, 18 Ves. 273-4.)

Provision is made for the execution of any trust in which an infant may be the trustee, under the direction

of a Court of Chancery. (V. C. 1873, c. 124, § 1; Id. c. 174, § 1, 4; 2 Inst. Com. & Stat. L, ch. X.)

It has been already observed that it is the duty of the guardian, *out of the income* of the ward's estate, real and personal, to provide for his *maintenance and education*, and in Virginia that principle is expressly sanctioned by statute (V. C. 1873, c. 123, § 7). And on the other hand, his expenditures for the purpose must, in general, be limited to the *annual profits* of the estate, including all belonging to the ward, whether in the hands of the guardian or of the personal representative of the father, unless the deed or will under which the ward's claim is derived allows more; which principle also is confirmed by the statute (V. C. 1873, c. 123, § 8). And let it be observed, that the surplus of one year not required for disbursements becomes a *part of the principal*, and cannot be employed by the guardian to meet disbursements of subsequent years, except where it is allowable for that purpose to encroach on the principal. (2 Stor. Eq. § 1355; Fonbl. Eq. B. I., c. 2, § 1, & n (d) & (e); Barlow v. Grant, 1 Vern. 255; Bostwick's Case, 4 Johns. C. R. 103; Hooper v. Royster, 1 Munf. 129, 132; Foreman v. Murray, 7 Leigh, 416, 418; Bennett v. Claiborne & als, 23 Grat. 374.)

In respect to *real estate*, the doctrine of restricting the guardian to *annual profits* for the ward's maintenance and education is believed to *admit of but one, and that a very qualified, exception*. The ward's lands may indeed be sold, as we have seen, where his interest requires it, under the direction of the *circuit or corporation court in Chancery*, but the proceeds are required to be not expended, but *invested* (V. C. 1873, c. 123, § 7); and upon the infant's death under age, are to pass (so much as remains unexpended) to his heirs as *real estate*. However, the *circuit court* in chancery (and as is presumed the *corporation court* also—Va Const. 1869, Art VI. § 14; V. C. 1873, c. 154, § 38), when it appears to its satisfaction that the proper maintenance and education, or other interests of an infant require that such proceeds beyond the *annual income* should be applied to the use of the infant, may so order; and then as to so much of proceeds as shall be thus applied they shall be deemed *personal estate*, but no further. (V. C. 1873, c. 123, § 13). And it is expressly enacted (V. C. 1873, c. 123, § 9) that whilst the ward's *personal estate* may, in proper cases, be sold by the guardian to pay the balance of expenditures over and above the income of

his estate, yet "neither the *ward personally* nor his *real estate* shall be liable therefor."

As to *personalty*, however, more indulgence is shown, and disbursements beyond the annual income of the ward's property are allowed in a few cases, but not without an anxious vigilance on the part of the court of equity. Independently of statute, the rule seems to be that the guardian can never, of his own authority, exceed the ward's income, and break in upon the principal, but must obtain the *previous sanction* of the court therefor; that the court will allow it only in extraordinary cases, and is especially averse to permitting it when the ward is of age to *go to service* or to be *bound apprentice*, and for the purpose of *maintenance* merely, and not of education. He shall not be permitted, as has been well said by an eminent judge, to keep his ward idle and unemployed, and eating up his little patrimony, so that when he comes of age he is turned adrift penniless—and what is worse, without a trade or calling to support him, and without habits of industry; Nor will any degree of meritoriousness in the guardian's administration induce the court at common law to sanction an expenditure in excess of income incurred without its own *previous approval*. (2 Stor. Eq. § 1335; Barlow v. Grant, 1 Vern. 255; Walker v. Wetherell, 6 Ves. 473; Myers v. Wade, 6 Rand. 444; Broaddus v. Rosson, 3 Leigh, 12; Anderson v. Thompson, 11 Leigh, 439; Jackson v. Jackson, 1 Grat. 144.)

The statutes of Virginia have somewhat relaxed this spirit of suspicious jealousy towards guardians. Thus, whilst they declare the *general rule* that no disbursements shall be allowed, where the deed or will under which the estate is derived does not authorize it, beyond the *annual income* of the ward's estate, yet provision is made in express terms for the two following exceptions (V. C. 1873, c. 123, § 8), viz.:

*First*, Where the ward is of *such tender years*, or *so infirm*, that he cannot be bound out as an apprentice, or *no suitable person will take him*; or,

*Secondly*, Where, although old enough to be bound out as an apprentice, it *shall be deemed best* for the ward that the principal of his personal estate, or a portion thereof, should be applied towards his education and maintenance; and the court shall be satisfied that such expenditure was *actually made*, and was *judicious and proper*, and shall allow the same.

This statutory provision, therefore, is little more than the enactment of the principles previously recognized

is equity—just with this difference that the judicial approval of the court is not required in the former, as it was in common law, but that it suffices if the court subsequently ratify the expenditure, being satisfied that it was properly made, and was judicious and proper. And accordingly it is declared that when any disbursements exceeding the actual profits are allowed the court may order the ward's personal property to be sold in order to meet the excess, or may sanction a sale already made by the guardian. But as we have seen neither the ward personally nor his real property is liable for such disbursements. (V. C. 1873, c. 123, § 9.)

On the other hand, as we have seen, no personal responsibility attaches by law to the guardian for the expense of educating and supporting the ward. If he is liable at all, it is in consequence of his own promise, which, like other promises, may be either *express* or *implied*. But his personal liability on such promise is not obviated by his styling himself *guardian*; nor does his personal responsibility do away with the creditor's right to charge the ward's estate in his hands, unless his personal promise was taken avowedly *in satisfaction* of the demand. (Hamlin v. Anderson, 6 Rand. 579; Barnum v. Frost, 17 Grat. 398.)

#### 6<sup>th</sup>. Guardian's Accounts and Allowances.

In discussing the doctrines applicable to the settlement of the accounts of a guardianship we are to have regard to, (1), The general doctrine of the accountability of guardians; (2), The particulars for which a guardian is accountable; (3), The means provided in Virginia to compel the prompt and accurate settlement of guardian's accounts; and (4), The mode of stating guardian's accounts;

W. C.

#### 1<sup>st</sup>. General Doctrine of Accountability of Guardians.

Guardians who have charge of *infants' estates* (namely, with us, guardians *by election*, *by appointment of the chancery court*, and *by the father's will*). are accountable for *all profits* which are or ought to have been received, and for *all losses* incurred through the guardian's default.

Before the infant ward attains his age this accountability may be enforced by a suit by the infant, under the protection of his *prochein ami*, or next friend (but still in the name of the infant); and after he attains his age, by a suit in his own name alone. (Lemon v. Harnsbarger, 6 Grat. 305; Villa Real v. Mellish, 2 Swanst. 537; Bac. Abr. Infancy (K).)

The infant, indeed, when he has no regularly appointed guardian, has the extraordinary privilege of being allowed to elect whether to regard a stranger who enters upon his lands, either as a *wrong-doer* and disseisor, or as a *guardian*, and as such to constrain him to account for the profits. So, also, where executors or trustees have charge of an infant's estate during minority, whether irregularly and improperly, or in pursuance of the will or deed of one who had power to confer the authority, they are to be regarded as *quasi guardians*, and must account accordingly. (*Garrett v. Carr & ux*, 1 Rob. 196.)

This responsibility of guardian to ward cannot, at common law, be exacted *from* the personal representative of a guardian, nor *by* the personal representative of a ward, because that *matters of account* lie so much in privity between the parties that strangers cannot well adjust them. But by statute, with us (V. C. 1873, c. 142, § 14), taken from 4 & 5 Anne, c. 16, "an action of *account* (and therefore a bill in equity) may be maintained *against the personal representative* of any guardian." And in England several statutes have been passed to remove the disability of the *personal representative of the ward* to sue the guardian for an account (namely, the Stat. 13 Edw. I, c. 23, applicable to *executors*, and 31 Edw. III, c. 11, applicable to *administrators*); but by a singular oversight these provisions have not been adopted in Virginia, unless they are to be considered as embraced in V. C. 1873, c. 126, § 19, 20, allowing actions *on contract*, and actions for *torts to property* to be maintained *by or against* personal representatives, or as within the saving (V. C. 1873, c. 15, § 2), of all writs, *remedial and judicial*, given by any act of Parliament not local to England, prior to 4 Jac. I. (Bac. Abr. Guardian (I); *Garrett v. Carr, &c.*, 1 Rob. 196; *Lemon v. Harnsbarger*, 6 Grat. 302; 1 Th. Co. Lit. 339-'40, & n (11), (12); 2 Lom. Ex. 588-'9; *Cary v. Bertie*, 2 Vern. 342; *Newburgh v. Bickerstaffe*, 1 do. 295; *Pomfret v. Windsor*, 2 Ves. Sen'r, 484.)

2<sup>s</sup>. The Particulars for which a Guardian is Accountable.

These particulars comprise, (1), The ward's estate which did or might have come to the guardian's hands; (2), The losses arising from the guardian's neglect; and (3), The losses arising from the misconduct of a co-guardian;

W. C.

1<sup>h</sup>. The Ward's Estate which did or might have come to the Guardian's hands.



The fundamental principle of a guardian's accountability is that he is liable "at the expiration of his trust, to deliver and pay all the estate or money in his hands, or with which he is chargeable, to those entitled thereto." (V. C. 1873, c. 123, § 7.) He must therefore account for all of the ward's estate that did come, or, with due diligence, might have come into his possession. (*Burnley v. Duke*, 1 Rand. 113.) And in rendering that account, if the guardian was also executor or administrator of the decedent from whom the ward derived the estate, it must be observed, that as he *received* the property in the latter capacity, he must be presumed to retain it in the same character, until he shall indicate by act or declaration that his intention is to hold it *as guardian*; and it is only then that the responsibility is shifted from the sureties in the *administration* to the sureties in the *guardian's bond*. (*Myers v. Wade*, 6 Rand. 444; *Broaddus v. Rosson*, 3 Leigh, 12; *Morrow v. Paxton*; 8 Leigh, 75-'6; *Hannah's Adm'r v. Boyd & ux & als*, 25 Grat. 692.)

2<sup>b</sup>. Losses arising from Guardian's Neglect, &c.

For property or debts lost by the guardian's neglect he is liable, and in the case of *debts* he is, by statute, liable for interest as well as principal. (V. C. 1873, c. 128, § 7.) But when the collection is actually made, he ought to be charged with interest from the time the money was received (of which his own oath is *prima facie* evidence), and not from the time it was *payable*. (*Dilliard v. Tomlinson*, 1 Munf. 183; *Cavendish v. Fleming*, 3 Munf. 201.)

He is also liable for payments which he *knows* he might *by law successfully resist*, it being expressly provided (V. C. 1873, c. 128, § 7), that no credit shall be allowed therefor; a doctrine which is universally admitted at common law, when the illegality appears *on the face of the security*, and although controverted, is sustained, independently of the statute, by the great weight of authority, even when the illegality, though known to the guardian, is *not apparent* on the instrument, but has to be proved extrinsically. (2 Lom. Ex. 488-'9; *Carter's Ex'ors v. Cutting*, 5 Munf. 239; *Tunstall v. Pollard*, 11 Leigh, 38-'9; *Kee v. Kee*, 2 Grat. 116, 128; *McCulloch v. Dawes*, 9 Dowl. & Ry. (22 E. C. L.) 40; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503.)

A guardian may also become liable by improperly compromising or releasing a demand due his ward, or by cancelling a security therefor. And if he takes



an *obligation* in his own name for a simple contract debt due his ward, he is, at law, as much chargeable as if he had received the money. It is a *quasi payment*, the new security *under seal* extinguishing the old debt. But whilst this is the general rule, which it is commonly safer to observe, yet compromises of *doubtful claims*, the payment of debts *perhaps* illegal and unrecoverable—in short, any such course of management of the ward's estate, as a judicious man in the conduct of his own affairs, having respect solely to the probabilities of profit or loss to result therefrom, would have adopted under the circumstances, will be regarded by a court of equity as justifiable. (2 Lom. Ex'ors, 485 & seq.; Clay v. Williams, 2 Munf. 125; McCall v. Peachy's Adm'r, 3 Munf. 288; Bowden v. Taggart, 3 Munf. 513; Pulliam v. Johnson, 4 Munf. 71; Kee v. Kee, 2 Grat. 131; Whentley v. Martin, 6 Leigh, 71; Braxton v. Harrison, 11 Grat. 54; Boyd's Sureties v. Oglesby, 23 Grat. 683-'4.) And this power of compromise and adjustment, on the part of not guardians only, but of *any fiduciary*, is, in Virginia, confirmed by statute, where it is ratified and approved *by a court of equity*. (V. C. 1873, c. 128, § 39.)

A guardian is liable for any act of negligence which injures the ward's estate,—as delaying without cause the payment of a debt carrying interest, suffering a suit to be brought and costs incurred when he has means to pay the demand, and has no reasonable ground for contesting it, delaying to sue until the ward's claim is barred by the statute of limitation or lost by the debtor's insolvency. But, on the other hand, a guardian is not bound to sue when suit would plainly be vain; nor, it seems, is he bound to appeal from the decree of a court of competent jurisdiction, in any case, however seemingly erroneous it may be, and although advised by counsel so to do. (2 Lom. Ex. 477; Liddesdale v. Robinson, 2 Brock. 160; Green v. Hanbury, Id. 404; Davis v. Newman, 2 Rob. 678; Miller v. Holcomb's Ex'or, 9 Grat. 665; Nelson v. Page, 7 Grat. 166; Mitchell v. Trotter, 7 Grat. 136; Bowers v. Glendening, 4 Munf. 219.)

The guardian is not liable, at least in equity, for the goods of the ward which are stolen or destroyed without his default—that is, notwithstanding the employment on his part of such care as a man of ordinary prudence takes of his own goods. So no liability arises when the loss accrues by the failure of a

security in which common usage and belief warrant confidence. It is indiscreet, however, to select investments depending on mere *personal security*. They should be either protected by a lien on lands, or should consist of such stocks and public bonds as the courts of chancery are accustomed to direct investments to be made in. But the safer way is to apply for and adopt the advice of the court under whose direction the guardian's account is settled, which is expressly empowered by statute (V. C. 1873, c. 128, § 30) to order the fund in hand "to be invested or loaned out, or to make such other order respecting the same as may seem to it proper." But such order can be legally made only after notice to the parties concerned, either given specially, or by the general notice, which the commissioner is required to post at the courthouse door. (Whitehead v. Whitehead, 23 Grat. 379.) During the late war the *Richmond Legislature*, which wielded *de facto* the government in Virginia, by statute (Acts 1862-'3, p. 81, c. 46, § 1), authorized a circuit judge in term, or *in vacation*, to direct fiduciaries (including guardians) to invest in the bonds and certificates of debt of the Confederate States, or of Virginia, or any other sufficient bonds or securities of or within the State; and such investments, therefore, being made according to the law of the *de facto* government, would, it seems, exonerate the guardian (See 1 Lom. Ex. 480, 483, &c., 1 Stor. Eq. § 89, 90; Clough v. Bond, 3 My. & Cr. (14 Eng. Ch.) 496); that is, supposing the transaction to be fair, and that the three circumstances contemplated by the statute concur, namely: (1), That the money is in his hands; (2), That it was received in the *due execution* of his trust; (3), That for some cause he is *unable to pay it over* to the parties entitled. (Campbell v. Campbell, 22 Grat. 649; Berry v. Irick, Id. 614.) It is a general principle applicable to fiduciaries of all kinds, and, amongst others, to guardians, that no more should be required of them than that they act in *good faith*, and with the same prudence and discretion that a prudent man is accustomed to exercise in the management of his own affairs. (Knight v. Ld. Plymouth, 3 Atk. 480; Thompson v. Brown, 4 Johns. C. R. 619, 628; Hart v. Ten Eyck, 2 do. 62; Taylor v. Benham, 5 How. 233; Elliott v. Carter, 9 Grat. 541, 559-'60; Davis v. Harman, 21 Grat. 200; Myers v. Zetelle, Id. 758 to 760.)

In general a guardian is liable for the acts and de-

faults of an agent as though they were his own; but, where the employment of an agent is necessary, or under like circumstances is usual, this stringent rule of liability is relaxed, and nothing more is required of him than the exercise of *good faith* and of ordinary care in selecting his agent, and in watching his conduct and solvency. Hence, if money be deposited by a guardian in bank, not to his individual credit (which would be treating the money *as his own*), but to his credit *as guardian*, the failure of the bank involves no liability on his part, if he selected it as a place of deposit in *good faith*, and exercised ordinary discretion, care, and vigilance. (2 Lom. Ex. 482; Clough v. Beard, 3 My. & Cr. (14 Eng. Ch.) 496.)

The guardian is not to be charged with the ward's services, even as a set-off to his board, unless they were such as, under the existing circumstances, the guardian ought fairly to have expected to afford compensation for them. (Armstrong v. Walkup & als, 12 Grat. 613; Evans v. Pearce, 15 Grat. 516.)

The sale of the ward's property at an under value, when by a prudent discharge of his duty, and the exercise of a reasonable discretion on the part of the guardian in respect of time and place of sale, or the credit allowed, more might have been obtained, subjects the guardian to make good the loss. And much more is he liable if, by himself or another, he converts the ward's goods to his own use, whether corruptly or through negligence, as where he applies them to discharge a debt due from himself. And whoever comes into possession knowingly of such effects, by collusion with the guardian, and by co-operating in his fraud, is liable to the ward, as the guardian is, for what is so received. (2 Lom. Dig. 476; Dodson v. Simpson, 2 Rand. 294; Graff v. Castleman, 5 Rand. 195; Broadus v. Rosson, 3 Leigh, 12; Fisher v. Bassett, 9 Leigh, 119; Pinckard v. Woods, 8 Grat. 140; Hunter v. Lawrence, 11 Grat. 132; Jackson v. Updegraffe & als, 1 Rob. 107.)

3<sup>d</sup>. Losses arising from the *Misconduct of a Co-Guardian*.

Where there are several guardians, the default of one is not chargeable upon a co-guardian, who *did not concur in the act*. But any *manner of concurrence* will subject him to answer, such as voluntarily committing the ward's funds, without sufficient reason, to the defaulter; or arranging that he shall receive them. (2 Lom. Ex. 490 & seq; Bac. Abr. Ex'ors (D.); Id.

Guard'n (H.); *Morrow v. Peyton*, 8 Leigh, 64, 68; *Graham v. Austin & als*, 2 Grat. 273; *Frazer's adm'r v. Bevill & als*, 11 Grat. 15.)

But if the funds are committed to the co-guardian in *another capacity* (e. g. as a banker,) the liability is no more than when they are entrusted to any other banker. Business cannot be transacted without trusting some one, and it is no more unlawful to trust a co-guardian, in another capacity than as guardian, than it is to trust a stranger. (2 Lom. Ex. 493-'4, 497; *Bacon v. Bacon*, 5 Ves. 331; *Langford v. Gascoyne*, 11 Ves. 335-'6; *Davis v. Spurling*, 1 Russ. & My. (5 Eng. Ch.) 66; *Boyd's ex'ors v. Boyd's heirs*, 3 Grat. 113.) It seems, therefore, to be deducible from the authorities, that in equity, generally speaking, the duty of a guardian is *not to part with the assets to a co-guardian*, but that in some instances it is allowable; and that whenever the transfer is made, the guardian who makes it is liable therefor, unless it is done for some *sufficient reason*, and usually for a specific purpose, as above explained.

As to the effect of *joint receipts*, as between co-trustees on the one side, and co-executors or co-guardians on the other, as making them all liable for what is acknowledged to be received, see 2 Lom. Ex. 498, &c.; *Price v. Stokes*, 11 Ves. 324-'5; *Ld. Shipbrooke v. Ld. Hinchinbrooke*, 16 Ves. 479; *Post. Vol. II, ch. X.*

3<sup>d</sup>. The Means provided in Virginia to Compel the *prompt and accurate Settlement* of Guardian's Accounts.

Thus much for the general principles which regulate the *guardian's accountability*. We are next to consider the *apparatus* provided by law to compel the prompt and accurate settlement of guardian's accounts, and the principles which regulate the preparation for such settlements.

The provisions of our statute upon this subject are eminently wise. They are directed to provide one or more officers in each county, who shall be charged specially with the supervision of the accounts of guardians and other fiduciaries; to secure an early return of an *inventory* of whatever property may come to the fiduciary's hands, and also of an *account of any sales* which he may make; and to compel an *annual settlement* of his accounts. Accordingly, in the further exposition of the subject we will consider, (1), The commissioner of accounts for each court charged with the appointment of guardians; (2), The return by the guardian of an inventory, and an account of sales made by him;

and (3), The annual settlement of guardian's accounts ;  
W. C.

1<sup>h</sup>. The Commissioner of Accounts.

We have seen that the circuit, county, and corporation courts with us are charged with the superintendence of the settlement of guardian's accounts, and the control of their conduct. In order to facilitate their supervision, the judge of every court of probate is required to "designate one of its commissioners in chancery (of whom each court has *three*, V. C. 1873, c. 171, § 2, 3), who shall be known as the *commissioner of accounts*, and who, in addition to his other duties, shall have a general supervision of all fiduciaries admitted to qualify in that court, and make all *ex parte* settlements of accounts of such fiduciaries;" and, if need be, another of the commissioners is to be appointed from time to time to aid him. (V. C. 1873, c. 123, § 13; Id. c. 128, § 1 & seq.; 16 & seq.)

It is the duty of the *commissioner of accounts* to get from the clerk of his court, after each term, a list of all the fiduciaries who have qualified thereat; and thenceforward it is his duty to require them punctually to conform to the directions of the law, in respect to an *inventory* of the property subject to their control; to an *account of sales*; and to the *periodical settlement* of their accounts. And in order that the commissioner may perform his duty systematically, it is required of him to keep a record, showing in several columns the particulars following (V. C. 1873; c. 128, § 1 & seq.; Matt. Com'rs, 28), namely :

1. The name of the Fi- duciary.	2. The name of the per- son whom he repre- sents, as in case of the <i>guar- dian</i> , the name of the <i>ward</i> .	3. The penal- ty of the Fiducia- ry's official bond.	4. The names of his sureties.	5. The date of the or- der con- ferring his authority.	6. The date of the order revoking his autho- rity, if it be revok- ed; and which fact is to be certifi- ed by the clerk of the court to the comm'r.	7. Date of re- turn of the <i>inventory</i> of the es- tate.	8. Date of <i>each settle- ment</i> of Fi- duciary's accounts.

2<sup>h</sup>. The Return of the Inventory and Account of Sales by the Guardian.

Every guardian is required, within *four months* from his qualification, and within four months after any subsequent accession of property belonging to the ward, to return to the *commissioner of accounts* an inventory of all the estate, real and personal, which is subject to his authority as guardian; and if he fail so to do, the commissioner shall take proper steps to compel him to do it, by causing the court to impose on him a fine of from \$50 to \$100 for any delinquency; and if he persists in his contumacy, to proceed against him for *contempt*. The guardian is also required, within *four months* after *any sale* of the ward's property, to return to the *commissioner of accounts* an account of sales. Both these returns the commissioner is to inspect, and if they are in proper form, he is, within *ten days*, to deliver them to the clerk of the court *to be recorded*. (V. C. 1873, c. 128, § 4 to 6.)

These provisions very happily secure the means of holding guardians to a just accountability. Most of the defaults of this class of fiduciaries arise, not out of a preconceived purpose of dishonesty, but from negligence in preserving a memorial of what comes to their hands, and a delay in settling their accounts; and to this latter object—namely, to compel an *annual settlement*,—the statutory provision next to be mentioned is addressed.

3<sup>h</sup>. The *Annual Settlement* of Guardian's Accounts.

Every guardian is required to settle his accounts *annually*, within six months after the end of every year, before the *commissioner of accounts* of the court which appointed him. And if he fails to do so, the commissioner is directed to take steps to compel him, by means of a fine of from \$50 to \$500, to be imposed by the court, and if need be, by proceeding for *contempt*; and he also forfeits all compensation for his services during the period to which the commission relates; but this denial of compensation is not to apply where the guardian has within the six months after the end of any year, furnished the ward (being *now adult*) with a statement of the account, and settled the same with him; nor where he has laid a statement of his account before a commissioner in chancery, upon an order of account in a pending suit. (V. C. 1873, c. 128, § 8 to 11; Synops. Crim. Law, 212-'13.) Until a recent period this forfeiture was very wholesomely absolute, however meritorious the



guardian's administration. (Wood's Ex'or v. Garnett, 6 Leigh, 274; Boyd's Ex'ors v. Boyd's Heirs, 3 Grat. 124-'5.) But by statute, since 1870, it has been in the discretion of the court. (V. C. 1873, c. 128, § 9.)

For the steps to be taken to secure the funds in the guardian's hands, if they shall seem to be in danger, and if need be, to remove the guardian and appoint a new one, reference may be made to the statute. (V. C. 1873, c. 128, § 17, 18, & seq.)

The commissioner is required to give notice of the fact that a guardian's account is pending before him, by notice at the front door of the court-house on the first day of a county or corporation court, and he is not to complete the same until ten days after such notice. Any one interested, or his next friend, may appear before the commissioner, and insist upon or object to anything, in like manner as if the commissioner were taking an account by order in a pending suit. The commissioner is to file his report *as soon as it is completed*, and after the *lapse of a month* it is open to examination, when the court shall consider it, with any objections which may be made thereto, and confirm it, in whole or in part, or re-commit it to the same or another commissioner, as upon the whole may be deemed right. When the report is confirmed, it is *recorded*, and is thenceforward taken *prima facie* to be correct, subject, however, to be *surcharged and falsified* by a suit instituted in due time for the purpose. And where the report shows money to be in the guardian's hands, the court may order payment of it to whom it may be due, or that it be invested, loaned, or otherwise disposed of, as to it may seem proper. (V. C. 1873, c. 128, § 30.) But in order that any such order of court may be obligatory upon the parties or an acquittance to the guardian, the commissioner must have posted the required notice at the front door of the court-house, as we have seen the law requires, or special notice must have been given of the design to apply to the court. (Whitehead v. Whitehead & als, 23 Grat. 379-'80.)

If there are several wards, it is the guardian's duty to keep *separate accounts with each*; and whether he does it or not, the commissioner must state the accounts with them severally, and, as far as practicable, bring the items applicable to each under the proper account to which it belongs. (Bac. Abr. Guardian (I); Armstrong v. Walkup, 9 Grat. 376.)

Very similar provisions are applicable to other fidu-



ciaries besides guardians.—as to personal representatives, curators, and committees of lunatics; and also to trustees in deeds of trust. (V. C. 1873, c. 128, § 4, 5, & seq.)

#### 43. The mode of stating Guardian's Accounts.

In respect to the mode of stating guardian's accounts, it will be proper to advert to (1), The general principles regulating the statement of such accounts; (2), The mode of charging interest in respect of guardians; (3), Allowances to guardians; (4), Doctrine touching the validity of a guardian's private settlement with his ward, &c.; (5), Doctrine as to the guardian's own examination before the commissioner; (6), Doctrine as to the production of books and vouchers; (7), Mode of proceeding by ward against guardian, and limitation thereto; and (8), Form of stating guardian's accounts; W. C.

#### 1<sup>a</sup>. The General Principles regulating the Statement of Guardian's Accounts.

In making these yearly statements, an *annual rest* is made, of course, and a *balance struck*.

The accounts of each year embrace the transactions thereof, both receipts and disbursements, the receipts being stated on one side, and the disbursements on the other. *No interest* is calculated on the individual items on either side, and that notwithstanding the receipts may have been *early*, and the disbursements *late* in the year, or *vice versa*. The balance being struck on the transactions of the year, it *bears interest throughout the next year*, and usually constitutes the first item in the next year's statement.

This method of omitting interest on the separate items of the year's transactions on both sides, upon the whole, is not unequal, and at all events, as a *general rule*, is expedient, in order to save time, of which much would be consumed at a great expense (the commissioner being paid by the hour), if computations of interest were to be made on each of the multiplied particulars of receipt and disbursement of which a guardian's account commonly consists. And if in any instance the rule works a hardship, it is in the discretion of the commissioner and of the court to recede from it, being merely a rule of convenience. Thus, if a large sum is received or disbursed early in the year, and it would be unreasonable, under all the circumstances, to deny interest thereon until the end of the year, it may be allowed on the money *disbursed* from the date of the payment, and on the money

*received*, after a *reasonable time* for its investment. The common law fixes this *reasonable time* at the unreasonably *long* period of *six months*, whilst in Virginia it is, by statute (in the case of *guardians*), fixed at the more unreasonably *short* period of *thirty days*. (Hooper v. Royster, 1 Munf. 132; McCall v. Peachy's Adm'r, 3 Munf. 303; Garrett v. Carr, 1 Rob. 209; Armstrong v. Walkup, 12 Grat. 613; V. C. 1873, c. 123, § 12.)

2<sup>h</sup>. The Mode of Charging Interest in respect of Guardians.

The balance appearing to be due on either side by these annual settlements is to bear interest *during the ensuing year*, without qualification, if the balance be *in favor of the ward*, and is retained in the guardian's hands; but if it be loaned out or invested, the guardian is charged with such interest only as he does or *ought* to receive; and that as well where the balance is composed of interest or of *estimated profits*, as in other cases. (Garrett v. Carr, 1 Rob. 211.) But where the balance is *in favor of the guardian*, interest is not allowed upon so much thereof as consists of *interest*, or of mere *estimated and conjectural* amounts. The statute itself, indeed, expressly requires (V. C. 1873, c. 123, § 10), that if any balance, whether of profits *received or estimated*, or of *interest on principal*, be due by any guardian, or other person *acting as guardian*, at the end of any year, which ought to be invested or loaned out, within a reasonable time, for the benefit of the ward, and the same remains *in the hands of such guardian, &c.*, he shall be charged with interest on such balance from the end of the year in which it arose, and so on *toties quoties*, during the continuance of the trust. But from the termination of the wardship, by the ward's coming of age or otherwise, the account is to be settled upon the ordinary principles of debtor and creditor as to interest, compound interest being generally excluded on both sides. (Garrett Ex'or, &c., v. Carr, 1 Rob. 196; Childers v. Deane, 4 Rand. 406; Jackson v. Jackson, 1 Grat. 144; Cunningham v. Cunningham, 4 Grat. 43; Handley v. Snodgrass, 9 Leigh, 484; Armstrong v. Walkup, 12 Grat. 608, 812; Evans v. Pearce, 15 Grat. 515.)

And this rigor towards guardians has induced the legislature to allow them to recover compound interest on all bonds payable to them as guardians, and held for the benefit of the ward. (V. C. 1873, c. 123, § 11.)

3<sup>b</sup>. Allowances to Guardians.

Allowances to guardians will include (1), Disbursements by guardians; and, (2), Compensation to guardians.

W. C.

1<sup>a</sup>. Allowance of Disbursements by Guardians.

A guardian is to be allowed in his account any debts which he may *properly* have paid for his ward, whether contracted by himself, or obligatory upon him as descending from his father, &c.; any expenses reasonably incurred by the guardian in the fulfilment of his trust,—such as the cost of clothes, education, and other needful personal expenses of the ward, and such also as reasonable fees to counsel (although they may be greater than the law at the time prescribed), taxes, reasonable charges for the recovery of the ward's property when lost, hires of laborers, and other expenses incident to the cultivation of the ward's lands, repairs and suitable and beneficial improvements to the ward's houses, &c.; and under circumstances making it necessary,—clerk's hire, rent of counting-room, postage, &c., although these latter charges, when not *necessarily* considerable, are usually regarded as satisfied by the commissions of the guardian. (*Lindsay v. Howerton*, 2 H. & M. 9; *Nimmio's Ex'or v. Com'th*, 4 H. & M. 57; *Hooper v. Royster*, 1 Munf. 129, 132; *Hipkins v. Bernard*, 4 Munf. 93; *Foreman v. Murray*, 7 Leigh, 416, 418; *Ferneyhough's Ex'ors v. Dickinson*, 2 Rob. 582, 589; *Newton v. Poole*, 12 Leigh, 140.)

In respect to the expense of maintaining the ward, it is well settled that if the father be living and of sufficient ability, he is under a *legal obligation* to defray the charges, which in that case are not to be allowed to the guardian. (*Evans v. Pearce*, 15 Grat. 515.) On the other hand, where the guardian is not the parent, or is at liberty to charge the ward with his support, he is to be credited with the expense, notwithstanding he may have, at a previous period, declared (without valuable consideration), that he did not intend to charge him. (*Hooper v. Royster*, 1 Munf. 119; *Armstrong v. Walkup*, 9 Grat. 376; *Evans v. Pearce*, 15 Grat. 516; *Sayers v. Cassell*, 23 Grat. 532.)

As to the *vouchers* upon which these or other charges against the ward are to be allowed, they must be reasonably satisfactory to prove that the de-

mand is *just*, (which, in the absence of any circumstances of suspicion, may be afforded by the creditor's own *affidavit*), and that it *was paid*, which is generally proved by the *creditor's receipt*. But it seems that where an *ex parte* settlement has previously taken place, and a suit in equity is brought to *surcharge and falsify*, the vouchers referred to in the previous settlement are to be presumed satisfactory, and the burden of proof is upon the impeaching party. (2 Lom. Ex. 549; Corbin v. Mills, 19 Grat. 438; Newton v. Poole, 12 Leigh, 143.) And in some cases the guardian may properly be allowed small amounts *on his own affidavit alone*, especially where the account is of old standing, as over fourteen years, or the expense must probably have been incurred, and from its nature could not be expected to be sustained by other vouchers,—*e. g.* travelling expenses, postage, &c. (2 Lom. Ex. 549, 553, &c.; McCall v. Peachy, 3 Munf. 305; Newton v. Poole, 12 Leigh, 140, 142; Fitzgerald v. Jones, 1 Munf. 150; Liddesdale v. Robinson, 2 Brock 160; 1 Greenl. Ev. § 147, n. t.)

2<sup>1</sup>. Allowance of Compensation to Guardians.

The compensation to be allowed the guardian is in the discretion of the commissioner, subject to the control of the court; or, as the statute expresses it (V. C. 1873, c. 128, § 25), it is to be a "*reasonable compensation in the form of a commission on receipts, or otherwise.*" The common law denies the guardian any compensation whatever, (except in so far as it is bestowed by the father's will, or voluntarily conceded by the ward upon attaining his age, and after a final and complete settlement), regarding the office as one of friendship merely, which ought not to be undertaken for gain, and cannot be properly rewarded with money; and fearing that to allow compensation would open a door to abuses. (Robinson v. Pett, 3 P. Wms. 249; Hylton v. Hylton, 2 Ves. Sen'r, 548; 2 Wh. & Tud. L. C. (Pt. I), 337, 339; Moore v. Frowd, 3 My. & Cr. (14 Eng. Ch.) 50.) Our law in Virginia (and generally in the United States) takes a less sublimated view, and considers that it is best for the helplessness of infancy, that guardians should receive a fair compensation for their services, so as to induce competent persons to undertake the trust and to discharge it with assiduity. (2 Stor. Eq. § 1268, n 1; 2 Wh. & Tud. L. C. (Pt. I), 353, &c., 376.) A similar state of society, and a

corresponding assimilation of thought, has led to the practice of compensating guardians, (and usually *by commissions*), in most of the colonial dependencies of Great Britain, as, for example, in the West and East Indies. (Chatham v. Audley, 4 Ves. 72; Chambers v. Goldwin, 5 Ves. 837; S. C. 9-Ves. 268; Cockrell v. Barber, 2 Russ. (3 Eng. Ch.) 585.)

The *amount of compensation* allowed depends on the time, trouble and pecuniary responsibility involved in the guardian's duties in the particular case, with some reference also to the value of his services to the ward. It is therefore with us allowed in the form of *commissions*, and of commissions *on receipts*, not on disbursements. It is allowed on each year's transactions separately, and therefore is to be credited to the guardian before the annual balance is struck. (Cavendish v. Fleming, 3 Munf. 201-2, & note; Ferneyhough v. Dickinson, 2 Rob. 589; 2 Lom. Ex. 544.) The *amount* of the commissions is commonly *five per cent.*, but it may be less or more, as peculiar circumstances may make just; and so fixed is that ratio of compensation, that where the deceased father of the ward directed that the guardian should be *handsomely paid*, the court still fixed on *five per cent.* as the proper allowance. (Waddy v. Hawkins, 4 Leigh, 58; Triplett v. Jameson, 2 Munf. 243-'4; Sheppard v. Starke, 3 Munf. 42; Hipkins v. Bernard, 4 Munf. 93; Boyd's Sureties v. Oglesby, 23 Grat. 674.)

A commission of seven and a half, and even of ten per cent., has been allowed under peculiar circumstances, as where the estate was troublesome to manage, and the amount of *money* received small. (Fitzgerald v. Jones, 1 Munf. 156, 159-'60; McCall v. Peachy, 3 Munf. 306-'7; Cavendish v. Fleming, 3 Munf. 202; 2 Wh. & Tud. L. C. (Pt. I) 361-'2; Pusey v. Clemson, 9 Serg. & R. 209.)

On the other hand, if the guardian be left a legacy by *way of compensation* for his services, nothing is to be allowed in the form of commissions. (Jones v. Williams, 2 Call, 105; Granberry v. Granberry, 1 Wash. 250; Freeman v. Fairlie, 3 Meriv. 24; Cockrell v. Barber, 2 Russ. (3 Eng. Ch.) 585; 2 Wh. & Tud. L. C. (Pt. I) 367-'8.)

Compensation to a guardian being with us matter *of right and not of grace*, is not usually forfeited, save by statute, by his misconduct; but in Virginia he is, as we have seen, expressly deprived of his commissions by statute (V. C. 1873, c. 132, § 8) when

he omits to *settle his accounts annually*, as required by law; and this forfeiture it was formerly not in the power of the court to remit to him (6 Leigh, 274-'5; 1 Grat. 13; 3 Grat. 125; *Morris v. Morris*, 4 Grat. 345; *Ante*, p. 452); although at present it is. (V. C. 1873, c. 128, § 9.) And if he improperly convert property *into money*, he is denied commissions on the proceeds. (2 Wh. & Tud. L. C. (Pt. I) 357; *Bank of Virginia v. Craig*, 6 Leigh, 437.)

As to the *subject-matter* on which the percentage of commissions is to be computed, we have seen that it is *receipts*, and *not disbursements*; and under the description of *receipts*, are reckoned *bonds* which the guardian might *rightfully* have collected, but did not, and ultimately, with the ward's consent paid over to him in kind as so much money (*Ferneyhough v. Dickinson*, 2 Rob. 582, 589; *Claycomb v. Claycomb*, 10 Grat. 592); and so, where the guardian converts bonds or other debts into mortgages (without receiving the money), and delivers the mortgage to the ward (*Hipkins v. Bernard*, 4 Munf. 92). And of course money of the ward on hand at the commencement of the wardship is to be reckoned amongst the *receipts*, as are also the proceeds of *crops*, or indeed of any chattels *rightfully* sold (*Hipkins v. Bernard*, 4 Munf. 92.) But strange to say, although commissions are the guardian's compensation for the trouble he has about the whole trust,—in taking care of the ward, in managing his property, in selling it and receiving the price, including the risk of taking counterfeit money which, in general, would be his loss; (*Taliaferro v. Minor*, 2 Call, 192), and also in paying out money, and accounting, as well as in collecting debts,—yet it is held that the guardian can have no commissions on debts *due from himself* to the ward, with which he charges himself; as if the mere *receipt of the money* constituted the whole consideration for the commission, and the custody, disbursement, and accounting were nothing. (*Carter's Ex'ors v. Cutting*, 5 Munf. 227; *Ferneyhough v. Dickinson*, 2 Rob. 582. See *contra*, *Cockerell v. Barber*, 2 Russ. (3 Eng. Ch.) 588-'9, & n (b).)

Commissions are not in general to be allowed twice upon the *same capital*, notwithstanding the investments be changed; but (after being once allowed on the principal), only on the income arising from it. (*McCall v. Peachy*, 3 Munf. 297; 2 Wh. & Tud. L. C. (Pt. I.), 363, 365-'6.)

The rule when the fund comes into the hands of a *successor*, as to the allowance of a second commission, is not well defined. In New York it is usual not to *permit a guardian to resign*, except upon his relinquishing any commissions upon the fund transferred to his successor, whence it would seem to follow that, but for such an arrangement, a double commission would be allowed. *Sed quære.* (2 Wh. & Tud. (Pt. I), 357; Jones' case, 4 Sand. Ch'y, 616.)

Commissions are not to be computed upon the *value of property* belonging to the ward, and finally turned over to him in kind, unless, from being *perishable* or otherwise, it be such property as the guardian might with propriety have sold or converted into money, as in case of the bonds above mentioned; and if the guardian shall appear to have converted the ward's property into money with a view to commissions, where there was no sufficient reason therefor, commissions will be denied him. (Bank of Virginia v. Craig, 6 Leigh, 437; Ferneyhough v. Dickinson, 2 Rob. 582, 589; Claycomb v. Claycomb, 10 Grat. 592; 2 Wh. & Tud. L. C. (Pt. I), 357.)

Whether a guardian who employs an attorney or agent to collect money shall be allowed a commission thereupon, in addition to the compensation paid the attorney, depends on whether a prudent man would have employed an attorney to *collect his own money*. If he would, the guardian is to be allowed a commission in addition to that paid the attorney; otherwise not. (Carter's Ex'ors v. Cutting, 5 Munf. 241.)

Where there are several guardians the compensation is to be equally divided amongst them, unless some reason appear to the contrary—e. g., an *unequal share* of the labor and responsibility. (Claycomb v. Claycomb, 10 Grat. 589.)

In England a guardian, who is an attorney, cannot charge for his own professional services, but is permitted to employ another person, and to pay him for advice and aid. (2 Dan. Chan. Pr. 1432; 2 Wh. & Tud. (Pt. I), 339-'40.) In Virginia it is said to be the practice to allow attorneys who are fiduciaries a proper compensation for their professional services in the conduct of the business. (Matt. Guide for Com'rs, 99, 100.)

4<sup>h</sup>. Doctrine touching the Validity of a Guardian's pri-



vate settlement with his Ward, and of a conveyance by the Ward to him.

A guardian's private settlement with his ward is always scrutinized with rigor; and a *release without a settlement*, especially soon after the ward attains his age, however fair it may really be, is so liable to abuse and fraud as to be regarded in equity as constructively fraudulent and *voidable* at the instance of the ward. And upon like principles, a *conveyance* from a ward to a guardian, made soon after attaining age, and without a settlement of accounts, is viewed in the same light, as a transaction too likely to be a cloak for fraud to be tolerated, and therefore regarded in equity as constructively fraudulent, and voidable by the heir. So also, for kindred reasons, no fiduciary of any description is permitted to deal *for his own benefit* with the subject matter of his trust, not only because the parties are not on an equal footing in respect to acquaintance with the subject, but also because to allow the validity of such transactions would tend to corrupt the integrity of persons so situated, by setting their interest in opposition to their duty. For these reasons, the law holds transactions of that kind to be always *voidable by the beneficiary*. (Bac. Abr. Guardian (II); 1 Stor. Eq. § 317 & seq., 321 & seq.; 2 Rob. Pr. (1 Ed.) 158-'9; Armistead v. Waller, 2 Leigh, 14; Buckles v. Lafferty's Legatees, 2 Rob. 292, 299, &c.; Segar v. Edwards, 11 Leigh, 213; Bailey v. Robinson, 1 Grat. 4, 9, 10; Howery v. Helms, &c., 20 Grat. 7, &c.; 1 Wh. & Tud. L. C. 126, 134, 140; Fox v. Mackreth, 2 Bro. C. C. 400; S. C. 2 Cox, 320; Killick v. Flexney, 4 Bro. C. C. 161; Hall v. Hollet, 1 Cox, 134; Campbell v. Walker, 5 Ves. 678; S. C. 13 Ves. 601; Whichcote v. Lawrence, 3 Ves. 940; *Ex parte* Bennett, 10 Ves. 381; Downes v. Glazebrook, 3 Mer. 200; *Ante*, p. 222-'3.)

5<sup>h</sup>. Doctrine as to the Guardian's own Examination before the Commissioner.

It is the ordinary practice in equity, in every decree or order of account, to direct that the master commissioner may examine the parties upon interrogatories, in which case their answers are regarded as if made to a bill filed. Hence, so far as the answer is responsive to a question, it is evidence *for the respondent*; and the answer of one party is not, as a general rule, to be used against another (although a

co-party), but only against the respondent himself. But where of two co-parties one is in default and contempt, omitting to obey the commissioner's summons to appear before him, but, by his answer to the bill, acknowledging indebtedness, and another appears and is examined, stating the particulars of indebtedness, and that the assets to meet it were all turned over to the other party, it was considered admissible, under the peculiar circumstances, to presume against the party in default that he was solely responsible, and it was decreed accordingly. (2 Lom. Ex. 551-'2; 2 Rob. Pr. (1st Ed.) 329-'30, 404; 2 Smith's Chan'y, Pr. 122; Templeman v. Fauntleroy, 2 Rand. 434, 445.)

It is a general rule, in taking accounts before a commissioner, that a party, in his examination, may charge and discharge himself *in the same sentence*, but not in different sentences. And so, if by his answer he admits a fact, and insists on a distinct fact by way of avoidance, he must prove the latter by other testimony, whilst the fact admitted is thereby established against him. Thus, if a guardian admits the receipt of money for his ward, but claims to have disbursed it legally, his admission is sufficient evidence of the receipt, but the proper disbursement is to be proved by other satisfactory means. On the other hand, where the guardian states that the ward's father *gave him a sum of money* in his life time, if advantage is sought to be taken of the statement to prove the receipt of the money, the whole must be taken together, occurring as it does in one sentence; and the guardian can only be charged by disproving his averment as to the gift. (2 Lom. Ex. 550, 552; Beckwith v. Butler, 1 Wash. 224; Payne v. Coles, 1 Munf. 373; Kirkpatrick v. Love, 2 Ambl. 589; Blount v. Barrow, 1 Ves. Jun'r, 547; Ridgway, v. Darwin, 7 Ves. 405; Thompson, v. Lambe, Id. 588; Robinson v. Scotney, 19 Ves. 584.)

#### 6<sup>h</sup>. Doctrine as to the Production of Books and Vouchers.

One of the usual directions in every decree for an account is that the parties shall produce before the master-commissioner, on oath, all books, papers, and writings in their possession touching the enquiries to be made; and these are in general retained by the master for the benefit of the parties concerned, as long as they are needed. Nor can a guardian excuse himself from producing books, &c., because he has mixed therein other transactions not relating to his

trust. (2 Lom. Ex. 503 ; Freeman v. Fairlie, 3 Meriv. 43-'4 ; Salisbury v. Wilkinson, 1 Cox, 278.)

7<sup>h</sup>. Mode of Proceeding by Ward against Guardian, and Limitation thereto.

The ward may proceed by an *action at law*, on the guardian's official bond, against himself and his sureties; but as, in most cases, the settlement of the guardian's account is necessarily preliminary to any judgment, and, as a court of law has no means of adjusting such an account, it is allowable and usual to sue the guardian and his sureties *in equity*, which, by means of one of its master-commissioners, is enabled, with facility, to take the needful accounts. Such a suit, whether at law or in equity, may be brought during the ward's non-age, in his name, by his *prochein ami*, or next friend, or, after he attains his age, by himself alone. (2 Rob. Pr. (1st Ed.) 158.)

But the suit *upon the bond*, whether at law or in equity, is in Virginia limited by statute (V. C. 1873, c. 146, § 8, 9,) to *ten years* from the time when the right of action first accrued, which is declared to be from the "time when the ward attains the age of twenty-one years, or from the termination of the guardian's office, whichever shall happen first," saving to infants, married women, and insane persons, the like number of years after the removal of their disabilities, but so as in no case to exceed twenty years from the accrual of the right of action. (V. C. 1873, c. 146, § 9, 18.) Where, however, the proceeding is *not on the bond*, but against the *guardian alone*, or his representative, on the ground of *the trust* arising out of his fiduciary relation, the statute of limitations is not applicable (V. C. 1873, c. 146, § 9), and there is no other bar than that interposed by the discretion of the court in respect to stale and antiquated claims, where the transactions, by the lapse of time, have become obscure; or where, from the loss of vouchers or death of witnesses, injury would be likely to result; or where, from the mutual relations of the parties, a presumption of satisfaction fairly arises. (Bolling v. Bolling, 5 Munf. 334; Coleman v. Lyne's Ex'or, 4 Rand. 454; Burwell's Ex'or v. Anderson, 3 Leigh, 348; Carr v. Chapman, 5 Leigh, 171; Hayes v. Goode, 9 Leigh, 481; Handley v. Snodgrass, Id. 489; Aylett v. King, 11 Leigh, 491; Smith v. Clay, 3 Bro. C. C. 639, note; Lacon v. Briggs, 3 Atk. 105; Pick-

ering v. Stainford, 2 Ves. Jun'r, 272, 581 ; Harwood v. Oglander, 6 Ves. 199, 217.)

8<sup>h</sup>. Form of Stating Guardian's Accounts.

The form of stating a guardian's account will complete the illustration of the subject. It will be observed that, in the form annexed, the account is supposed to extend through *six years* ; that for the first two years (what seldom happens), the balance is *in favor of the guardian*, thus affording an opportunity of showing how interest is charged in that case (namely, *on the principal alone*, and not on the interest) ; whilst afterwards it is on the side of the ward, and thus shows how interest is charged in that case also ; and that for the last year the wardship is supposed *to be ended*, so as to entitle the guardian to be treated as an *ordinary debtor*.

The notes appended will remind the student of the explanations which have already been given in connection with the several particulars in the account which illustrate or exemplify them.



## STATEMENT OF

W. W. in account

Disbursements for Ward, per vouchers, .....	(1)	60	00
Do. Do. Do. ....	(2)	2,500	00
Do. Do. Do. ....	(3)	3,000	00
Interest on Disburs'ts of June 1, 1865, 11 mo. ....	(a)	187	50
Interest on Disburs'ts of October 1, " 7 " ....	(a)	105	00
Commission on Rec'ts this year (\$50), at 5 per ct. ....		2	50
		<b>\$5,805</b>	<b>00</b>
Balance per contra (Prin. \$5,562.50) (b).....		5,755	00
Disbursements for Ward, per vouchers, .....	(4)	345	00
Do. Do. Do. ....	(5)	36	00
Do. Do. Do. ....	(6)	42	00
Interest on disburs'ts of July 12, 1865, 9 mo. 18 d. (a)		11	56
Interest on Balance of last year (Prin. \$5,562.50) (b)...		333	72
Commission on Rec'ts this year (\$800) 5 per ct. ....		40	00
		<b>\$6,568</b>	<b>28</b>
Balance per contra.....		5,768	28
Disbursements for Ward, per vouchers, .....	(7)	184	00
Do. Do. Do. ....	(8)	228	77
Do. Do. Do. ....	(9)	37	00
Do. Do. Do. ....	(10)	28	00
Do. Do. Do. ....	(11)	64	00
Interest on Disburs'ts of June 1867, 10 mo. 12 d. (a)...		6	96
Interest on Disburs'ts of July 1, 1867, 10 mo. (a).....		11	44
Interest on Balance of last year (\$5,765.37).....		346	08
Commission on Rec'ts this year (\$41,730), 5 per ct. ....		2,083	50
Balance due Ward, (c).....		32,961	97
		<b>\$41,670</b>	<b>00</b>
Disbursements for Ward, per vouchers. ....	(12)	540	00
Do. Do. Do. ....	(13)	56	00
Do. Do. Do. ....	(14)	38	00
Interest on Disburs'ts June 24, 1868, 10 mo. 6 d. (a)...		25	94
Commission on Rec'ts this year (\$8,304.72) 5 per ct. ....		415	23
Balance due Ward, .....		40,191	52
		<b>\$41,266</b>	<b>69</b>
Disburs'ts for Ward, for coal mine, per vouchers, (15)		4,300	00
Do. Do. Do. Do. ....	(16)	720	00
Carried forward, .....		<b>\$5,020</b>	<b>00</b>

GUARDIAN'S ACCOUNTS.

with C. C. his Guardian,

Cr.

1865. May	2	By Cash received for Ward, this day.....	50	00
1866. May	1	" Balance due Guardian, (Princ. \$5,562.50) (b).....	5,755	00
			<u>\$5,805</u>	<u>00</u>
1866. Dec.	30	By Cash received for Ward, this day.....	800	00
1867. May	1	" Balance due Guardian,.....	5,768	28
			<u>\$6,568</u>	<u>28</u>
1867. May	30	By Cash received for Ward, this day.....	28,540	00
1868. Jan.	1	" Profits, one year, \$80,000 U. S. 6 per ct. bonds,.....	1,800	00
May	1	" Interest on money received 30th May, 1867, after thirty days, 10 months. (d), (a).....	1,380	00
		" Estimated profits of Coal mine, two years,.....	10,000	00
			<u>\$41,670</u>	<u>00</u>
1868. May	2	By Balance, <i>per contra</i> .....	32,961	97
1869. Jan.	1	" Profits, one year, U. S. bonds of \$80,000, 6 per ct.,....	1,800	00
May	1	" Interest on money received Jan. 1, 1869, after thirty days, 3 months, (a).....	27	00
		" Estimated profits of coal mine, one year, .....	4,500	00
		" Interest on balance of last year, (\$32, 961.97) (e).....	1,977	72
			<u>\$41,266</u>	<u>69</u>
1869. May	2	By Balance <i>per contra</i> , <i>invested by order of court</i> ,.....	40,191	52
Nov.	1	" Half year's interest on investment, received this day,	1,205	96
		Carried forward,.....	<u>\$41,397</u>	<u>48</u>



*Dr.**W. W. in account with*

1869.		Brought over,.....	5,020	00
Nov. 15		To disbursements for Ward, per vouchers.....	56	40
1870.				
Jan. 10	"	Do. Do. Do. ....	22	00
May 1	"	Interest on Disbursements, Oct 1, 1869, 7 mo. a .....	25	00
	"	Interest on disburs'ts Aug. 6, 1869, 3 mo 24 days a ..	189	20
	"	Commission on Rec'ts this year \$4,805.91, 5 per ct ..	241	20
	"	Balance due Ward, .....	39,473	23
			<u>\$45,027</u>	<u>63</u>
1870.				
Oct. 1		To disbursements for Ward, per vouchers.....	1,570	00
1871.				
May 1	"	Interest on disburs'ts of Oct. 1, 1870, 7 mo. a .....	44	95
	"	Commissions on Rec'ts this year \$11,434.51, 5 per ct ..	571	75
	"	Balance due Ward,.....	48,721	04
			<u>\$50,907</u>	<u>74</u>

*C. C., his guardian, continued.*

1869. May	1	Brought over,.....	41,397	48
		To Estimated profits on Coal mine, one year,.....	3,600	00
		“ Interest on money received November 1, 1869, after thirty days, 5 months,.....(a)	30	15
			<u>\$45,027</u>	<u>63</u>
1870. May Aug.	2 1	By Balance <i>per contra</i> , invested by order of Court,.....	39,473	23
		“ Half year's interest on investment, due 1st May, 1870,..... \$1,205.86		
		“ Interest thereon, collected of debtor, (f),... 18.09		
			1,223	95
Nov. 1871.	1	“ Half year's interest on investment, due this day,.....	1,184	19
Jan.	1	“ Profits on U. S. bonds, \$30,000, 6 per ct. two years, ...	3,600	00
		“ Interest on \$1,800, part of profits, one year,.....	108	00
May	1	“ Estimated profits of coal mine, one year,.....	4,000	00
		“ Interest on money received August 7, 1870, after thirty days, 8 months, (a).....	48	96
		“ Interest on money received Nov. 1, 1870, after thirty days, 5 months, (a).....	29	60
		“ Interest on money received Jan. 1, 1871, after thirty days, 3 months, (a).....	55	62
		“ Half year's interest on present investment, received this day,.....	1,184	19
			<u>\$50,907</u>	<u>74</u>
1871. May Sept.	2 1	By Balance <i>per contra</i> ,.....	48,721	04
		“ Interest on Balance to date when <i>Ward attains his age</i> , 4 months,.....	974	42
			<u>\$49,695</u>	<u>46</u>
1871. Sept.	1	By Balance due Ward this day, Principal,.....\$48,721 04 (g) Interest,..... 974 42		
1872. Jan.	1	“ Interest on principal (\$48,721.04) to date, 4 mo's.....	49,695	46
			993	90
			<u>\$50,689</u>	<u>36</u>
		Deduct cash then paid by Guardian,.....	32,000	00
			18,689	36
Mar.	1	“ Interest on \$18,689.36 to date, 2 months,.....	186	89
			18,876	25
		Deduct cash then paid by Guardian,.....	10,000	00
		Balance due Ward, March 1, 1872, with int. from that date,.....	<u>\$8,876</u>	<u>25</u>

## NOTES ON GUARDIAN'S ACCOUNT.

(a.) Interest is allowed on these several items of disbursement and receipt, notwithstanding the general rule to the contrary, because the sums are so considerable that it would be a hardship upon the parties severally, to postpone an allowance of interest until the end of the year, when the balance is struck. See *Ante* p. 454-'55.

In actual settlements there would hardly be so free a departure from the general rule, partly because the separate items would seldom be so large, and partly because the aggregate of gains on either side by such computations of interest, would generally be insignificant.

A careful survey perhaps would show ground of *exception* to the account for allowance of interest in some instances, (as in the *second year*); and for not allowing it in others (as in respect to the \$800 received in the second year.)

(b.) The principal is here discriminated from the interest, because, although, in pursuance of the Statute (V. C. 1873, c. 123, § 10, *Ante* p. 455), the guardian, supposing him to retain the money himself, pays interest on interest to the ward, yet the guardian is not himself allowed compound interest as against the ward.

(c.) In this third year of the guardianship, the balance shifts from the side of the guardian to that of the ward and remains in his favor until the end.

(d.) Only *thirty days* are allowed by Statute (V. C. 1873, c. 123, § 12), to the guardian to invest money, and he "shall not be charged with interest thereon until the expiration of said time, unless he shall have made the investment previous thereto." (*Ante* p. 454-'55.)

(e.) Here, although the balance with which the year begins consists largely of *interest, and of estimated profits*, yet interest is by Statute (V. C. 1873, c. 123, § 10), allowed thereon throughout the year. Where (as happens in the fifth year, 1869-'70), the guardian does not keep the balance himself, but *invests or loans it*, under the direction of the court, he is not to be charged with interest, unless and *until he receives it*. (*Ante* p. 455.)

(f.) The guardian is allowed by Statute (V. C. c. 127, § 11), to recover *compound interest* on "bonds" payable to him *as guardian*. (*Ante* p. 455.)

(g.) When the wardship terminates, as in this case it is supposed to do, just here (Sept. 1, 1871), the account is thenceforward adjusted on the principles applicable to ordinary *debtor and creditor* (*Ante* p. 455)—that is, the interest is computed upon the principal sum due to the ward to the time of the first payment, and that, together with the previously accrued interest being added to the principal, the payment is deducted from the aggregate, and if the payment exceeds the interest accrued, interest is computed on the remainder, until the next payment; and being added to the principal, the payment is deducted from the aggregate; and on the remainder as a new capital, interest is again computed, and so on until the demand is extinguished, or the account closed; the principle being to consider every payment as applicable, first to extinguish *all the accrued interest*, and the balance only as going to diminish the principal sum. And hence, when the payment is less than the interest which has accrued, the interest is to be computed for the next period, down to the ensuing payment, on the *preceding principal sum*. (Lightfoot v. Price, 4 H. & M. 431, 432; Story v. Livingston, 13 Pet. 371; U. States v. McLemore, 4 How. 286; 2 Pars. Cont. 147.) But this rule is not to the prejudice of any agreement of the parties to apply the payment to the principal, and not to the interest; so that if the guardian make a *voluntary payment* to the ward after he attains his age, and stipulate at the time that it shall be applied to principal, if the ward receives it, he must so apply it. (Story v. Livingstone, 13 Pet. 371; Connecticut v. Jackson, 1 Johns. Ch. R. (N. Y.) 17; Dean v. Williams, 17 Mass. 417; Lightfoot v. Price, 4 H. & M. 431; Pindall's ex'x v. Bank of Marietta, 10 Leigh, 484; Miller v. Trevillian & als, 2 Rob. 1.)

See "Matthew's Guide to Commissioners," 30 et seq., 38 &c.; a book which a Virginia practitioner, at least, can hardly dispense with.

5<sup>f</sup>. The Termination of the Guardianship.

The wardship, as we have seen, may be terminated by the ward's or by the guardian's *death*; by the guardian's *resignation* of his trust; by his *removal* from it by the court which appointed him, or by any court of chancery; by the minor, *if a male*, attaining the *age of twenty-one*, or if a *female*, attaining *that age*, or *marrying*; or in the case of a testamentary ward, by the *expiration of the period* prescribed in the will. (V. C. 1873, c. 123, § 7.)

2<sup>o</sup>. The Doctrine touching the Capacities and Incapacities of Infants.

In expounding the doctrine touching the capacities and incapacities of infants, we must have regard to, (1), The ages at which, respectively, infants are capable for divers purposes; (2), The precise time when an infant attains the age of twenty-one years; and (3), The Doctrine touching the privileges and disabilities of infants;

W. C.

1<sup>f</sup>. The Ages at which, respectively, Infants are capable for divers purposes.

Purposes for which an Infant's capability comes into question.	Doctrine at Common Law as to		Doctrine in Virginia.
	Males.	Females.	
For Betrothal .....	.....	7	Same.
" Crime (if discretion proved),	7	7	Same.
" Dower.....	.....	9	Same.
" Oath of Allegiance.....	12	.....	Same.
" Assent to Marriage.....	14	12	Same.
" Crime, (fully <i>capax doli</i> ).....	14	14	Same.
" Will of Chattels.....	14	12	18 (V. C. 1873, c. 118, § 3).
" Choosing Guardian.....	14	14	Same.
" Acting as Executor.....	17	17	21 (V. C. 1873, c. 126, § 1).
" Full Age.....	21	21	Same.

See 1 BL. Com. 463.

The two diversities between the doctrine in Virginia and at common law are seen from the table—namely, as to the age of making a *will of chattels*,—which, in Virginia, is eighteen in both sexes; and of *acting as executor*, which, with us, is twenty-one, because the statute (V. C. 1873, c. 136, § 1) forbids that one shall act as executor without *giving bond*, which no one can do legally, under the age of twenty-one.

Full age, in man or woman, is twenty-one, and until that time the person is styled *an infant*. This period



from this unwarranted assumption that, as the law knows no fraction of a day, the infant is of age on the *first moment* of the day preceding the twenty-first anniversary of birth. But it is apparent that, if it is allowable to confound thus the first moment of the anniversary with the last moment of the day preceding, it is, by parity of reason, in like manner allowable to confound the first moment of such preceding day with the last moment of the day before that; and thus, as no fraction of a day is acknowledged, the party is of age on the first moment of this last named day, and by parity of reason on the first moment of the day before that, &c., thus it is apprehended, reducing the proposition to an absurdity.

The citations in n (12) all refer to the same case,—*Herbert v. Tarbol*,—which is reported most at large in 1 Keb. 589. The proposition is a mere *dictum*, not necessary to the decision of the case, nor, so far as appears, involved in it at all; and, although not denied (for there was no occasion to contest it), was stated by only two of the four judges. In the case as reported in Raym. 84, the *dictum* is wholly omitted.

It is repeatedly mentioned afterwards, as by Lord Holt in *Fitzhugh v. Dennington*, 2 Ld. Raym. 1095, and by the court of C. B. in *Roe v. Hervey*, 3 Wils. 274, but always by way of illustration only, without any direct adjudication of the point.

### 3<sup>d</sup>. Doctrine touching the Privileges and Disabilities of Infants.

The very *disabilities* of infants are *privileges*, intended for their *benefit and protection*. We shall see what they are by observing, (1), The doctrine touching an infant's suing or being sued; and (2), The doctrine touching the privileges and disabilities of infants in relation to property and contracts;

W. C.

#### 1<sup>st</sup>. Doctrine touching an Infant's Suing or being Sued.

The doctrine touching an infant's suing or being sued, &c., may be contemplated with reference to (1), Infants suing; (2), Infants being sued; (3), Staying proceedings in suits by reason of defendant's infancy; (4), Effect of judicial proceedings in respect to infants; and (5), Infant's responsibility for crime;

W. C.

#### 1<sup>b</sup>. Doctrine as to *Infants Suing*.

An infant sues *in his own name* like an adult, but as he cannot appear *by attorney* (for want of discretion to choose one), he sues under the protection of





appear that he acted without due regard to the infant's interests. (Bac. Abr. Inf'y (K), 2; Mitf. Eq. Pl. 26; Burwell, &c. v. Corbin & als, 1 Rand. 151; 1 Am. L. C. 264; Turner v. Turner, 2 P. Wms. 297-'8; Pearce v. Pearce, 9 Ves. 548.)

2<sup>h</sup>. Doctrine as to Infants being sued.

An infant is sued *in his own name*, like an adult, but he cannot defend the suit *by attorney* (for want of discretion to select one), but must do so, in a civil case, by guardian *ad litem*. (Bac. Abr. Inf'y (K), 2; Id. Guard'n (A), 4; 1 Rob. Pr. (1st Ed.) 172-'3; Roberts v. Stanton, 2 Munf. 129; Brown v. McRea, 4 Muuf. 439; Beverleys v. Miller, 6 Munf. 99; Word's case, 3 Leigh, 743.) In a *criminal* prosecution he must appear like an adult, *by attorney, or in person*. (Word's case, 3 Leigh, 759.)

A guardian *ad litem* is compellable to serve, but is not liable for costs, and is to be allowed his reasonable charges against the party on whose motion he was appointed, who is usually *the plaintiff*. (V. C. c. 171, § 16; 2 Munf. 342.)

An infant is never to be prejudiced by any act, default or admission of his guardian *ad litem*. (Bac. Abr. Guar'n (A), 4; Bank of Alexandria v. Patton, 1 Rob. 500.)

If an infant defendant appear *by attorney*, the error is cured by the statute of *Jeofails*, (V. C. 1873, c. 177, § 3) if the verdict, judgment or decree is *for him, and not to his prejudice*.

3<sup>h</sup>. Doctrine as to *Staying Proceedings in Suits* because of the Infancy of Defendant.

The stay of proceedings because of defendant's infancy is called *parol demurrer*, which means the *stay of pleadings*. In Virginia, it is done away with by statute, which requires a guardian *ad litem* to be appointed, and directs that the suit shall go on. (V. C. 1873, c. 167, § 16; Bac. Abr. Inf'cy (L); 1 Rob. Pr. (1st Ed.) 161.)

4<sup>h</sup>. Effect of Judicial Proceedings in respect to Infants.

All courts are particularly charged with the protection of the interests of infants, and on a bill *in equity*, where an infant is plaintiff, will do what is best for him without regard to the prayer of the bill. (De Manneville v. De Manneville, 10 Ves. 59.) An infant *as plaintiff* is not personally liable for costs, but his *prochein ami*, or some other person who may have assumed to pay them, is (Anon. 1 Wils. 130; Noke v. Wyndham, 2 Stra. 694; Miller v. Smith, 2 Stra. 932); nor, it would seem, is he liable for costs *as de-*

*fendant*, although this latter proposition is controverted. (Bac. Abr. Inf'y (K), 2.)

But in respect to the substance of judgments and decrees, they are as obligatory upon infants as upon adults, with the exception that it has always been the practice *in chancery*, in decreeing *against an infant*, to reserve to him *six months after coming of age* to show cause against the decree; and as without such express reservation the decree is, at common law, absolutely binding, it is error to omit the reservation. (Braxton v. Lee's heirs, 4 H. & M. 376; S. C. 5 Call, 453; Pickett v. Chilton, 5 Munf. 467; Brown v. Armistead, 6 Rand. 602; Jackson v. Turner, 5 Leigh, 119; Tennent v. Patton, 6 Leigh, 196.)

The only exception to this doctrine is where lands are sold in order to make partition of the proceeds, where, by the tenor of the statute (V. C. 1873, c. 120, § 3), the infant is *allowed no day to show cause*. (Parker v. McCoy, 10 Grat. 594.)

The reservation being often omitted, and thereby decrees vitiated, a statute was passed (V. C. 1873, c. 174, § 10) declaring that infant defendants shall be allowed to show cause against decrees within six months after coming of age, whether leave be reserved in the decree itself or not, and indeed dispensing with such express reservation.

The cause to be shown must be such as exists at the *time of the decree*, and not such as may arise afterwards. (Walker v. Page, 21 Grat. 636.)

#### 5<sup>b</sup>. Doctrine as to Infant's Responsibility for Crime.

Under seven, an infant is wholly incapable of crime, and is not amenable to legal punishment. Between seven and fourteen he is *capax doli* only upon positive proof of intelligence sufficient rightly to apprehend the guilt of the act in question. Over fourteen, he is amenable to punishment as an adult. (1 Bl. Com. 464-'5; Bac. Abr. Inf'y (H); 1 Am. L. C. 264; Word's Case, 3 Leigh, 759; Crim. Synops. 8, 232.)

#### 2<sup>a</sup>. Doctrine touching Privileges and Disabilities of Infants in relation to Property and Contracts.

As a general rule, no neglect to claim or to sue will bar an infant of his rights, by *mere lapse of time*. (1 Bl. Com. 465; 2 Steph. Com. 333-'4; 1 Th. Co. Lit. 179-'80, & n (M); V. C. 1873, c. 146, § 4, 5, 18.) But the practical application and effect of that proposition must be studied in the light of the statute of limitations, just referred to.

Let us consider under this head—(1), The doctrine

touching the privileges and disabilities of infants in relation to the *disposition of property*; and, (2), The doctrine in relation to the privileges and disabilities of infants *touching contracts*.

W. C.

1<sup>h</sup>. Doctrine touching Privileges and Disabilities of Infants, in relation to the *Disposition of Property*.

An infant cannot in general aliene, or contract to aliene, or to do any other act which is binding, relative to his property; all transactions of that sort being *voidable* by him on his coming of age. But this principle is not without several exceptions. Thus an infant may make a valid *will of chattels* at eighteen (V. C. 1873, c. 119, § 3); may assign dower to his ancestor's widow, or make partition with some other joint owner, or may agree to do it, because he is *compellable by suit* to do both; may, under the direction of the court of chancery, *execute trusts*, or rather *may have them executed* (V. C. 1873, c. 174, § 7; Id. c. 124, § 1); may execute a power of appointment *simply collateral*; and may act as *agent or attorney in fact* for another person. (1 Bl. Com. 465; 2 Insts. Com. & Stat. L. ch. viii, xii; 1 Th. Co. Lit. 74, n (35); Sugd. Pow. 155.)

2<sup>h</sup>. Doctrine touching Privileges and Disabilities of Infants *in relation to Contracts Executory*.

There is a great want of precision in the doctrines scattered through the books, on the subject of the validity and effect of the contracts of infants. The result of them is very satisfactorily summed up by C. J. Eyre, in *Keane v. Boycott*, 2 Hen. Bl. 511, as follows, namely: that all the contracts of which the court can pronounce that it is *for the benefit of infants* to allow them to bind themselves by them, *are valid*; that all of which the court can in like manner pronounce that to allow infants to be bound thereby would be *to their prejudice*, *are void*; and that those of which nothing certain can be predicated as to whether it would be hurtful or profitable to infants to allow them to be bound thereby, *are voidable at the infant's election*. (2 Steph. Com. 335; 2 Kent's Com. 236, 243; *Zouch v. Parsons*, 3 Burr. 1801; *Keane v. Boycott*, 2 Hen. Bl. 511.)

Lord Mansfield's masterly exposition in the noted case of *Zouch v. Parsons*, 3 Burr. 1801, of the general considerations applicable to infant's contracts, though neither so comprehensive nor so practical as that of Mr. C. J. Eyre, is worthy to be transcribed:

“Miserable must be the condition of minors,” says he, “excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages, if they could do *no* binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts *for their own benefit*, and, without prejudice to themselves, for the *benefit of others*.”

He then proceeds to mention “a rule or two,” the reasons of which were applicable to the case before him, viz :

1st, If an infant does a right act which he *ought to*, which he was *compellable* to do, it shall bind him, as if he *make equal partition*; if he *pays rent*, &c.; for which and other similar instances the decisive reason is that “whatsoever an infant is *bound to do* by law, the same shall bind him, albeit he doth it without suit of law;” and it is immaterial by what method he is compellable, whether by the ecclesiastical or temporal courts.

2dly, The acts of an infant which *do not touch his interest*, but take effect from an authority with which he is entrusted, are binding; as when an infant *head of a corporation* joins in corporate acts, an infant officer does the duty of his office, an infant agent fulfils his agency, &c.

3dly, From the nature of the infant’s privilege, it is given as a *shield* to protect himself, and not as a *sword* to make aggressions upon others; and therefore it is never to be turned into an *offensive weapon* of fraud or injustice.

In the further prosecution of the subject let us consider, (1), What contracts of infants are *valid*, *void*, and *voidable*, respectively; (2), What confirmation is requisite and sufficient of such as are *voidable*; and (3), The acts for which infants are liable, notwithstanding their infancy;

W. C.

1<sup>1</sup>. What Contracts of Infants are *valid*, *void*, and *voidable*, respectively; W. C.

1<sup>1</sup>. Contracts of Infants which are *Valid*.

Such contracts are *valid* as it is *in general beneficial to an infant* to allow him to bind himself by. They consist of *four classes*, viz: (1), Contracts for *necessaries*; (2), Contracts of *marriage settlement*;

(3), Contracts of *apprenticeship*; and (4), Contracts to do what the law *would oblige the infant to do* at all events;

W. C.

1<sup>1</sup>. Contracts for *Necessaries*.

Necessaries are such supplies as are needful to enable the infant to live according to *his real* (not his *apparent*) position in society; and he who undertakes to supply him must determine that at his peril. They include, according to Lord Coke (1 Th. Co. Lit. 175), "necessary meat, drink, apparel, necessary physic, and other such like necessaries; and likewise good teaching or instruction, whereby he may profit himself afterwards." But *mere ornaments*, having no utility, can never be necessaries. (1 Bl. Com. 466, & n's (16) & (17); 2 Kent's Com. 230; 1 Pars. Cont. 245, & n (h), 246, & n (l); 3 Rob. Pr. (2d Ed.) 236; 1 Am. L. C. 249; Peters v. Fleming, 6 M. & W. 47.)

It seems to be the better opinion, both in England and America, that although the articles supplied be in themselves of the class of necessaries, yet if the infant be supplied with them from other sources, he is not liable to pay for them. The tradesman must, at his peril, discover whether the infant is actually in need of them or not. If he is already, in fact, supplied with such articles, whether by his friends, or by another tradesman, there can be no recovery from the infant for the additional supply. (Ford v. Fothergill, 1 Esp. 211; Cook v. Deaton, 3 Carr. & Payne (14 E. C. L.) 114; Story v. Perry, 4 Carr. & P. (19 E. C. L.) 526; Burghart v. Angerstein, 6 Carr. & P. (25 E. C. L.) 690; Steedman v. Rose, 1 Carr. & M. (41 E. C. L.) 422; 3 Rob. Pr. (2d Ed.) 233-'4; Bac. Abr. Inf. (I) 1; 1 Am. L. C. 248.)

As to the particular subjects which have been regarded as necessaries, see 1 Pars. Cont. 246, n (l). An infant has been held liable for the *hire of servants* adapted to his station, and for the reasonable rent of a suitable dwelling or lodgings (Evelyn v. Chichester, 3 Burr. 1719; Lowe v. Griffith, 1 Scott, 458); an infant captain in the army for a *livery for his servant*, but not for *cockades for his men* (Hands v. Slaney, 8 T. R. 578); nor a naval lieutenant for a *chronometer*, unless it can be proved specially to have been a necessary for him. (Berolles v. Ramsay, 1 Holt. (3 E. C. L.) 77.) A

suit of regimentals is a necessary to a militia officer expecting to be called into service (Coates v. Wilson, 5 Esp. 152); but not a racing jacket to anybody *but a jockey*, nor a waistcoat at *eleven guineas* to a minor of any station in life whatsoever (Burghart v. Angerstein, 6 Carr. & P. (25 E. C. L.) 690); nor horses, saddles, harness and gigs to an Oxford student, the son of a gentleman of fortune (unless upon special circumstances of health, &c.), although the youth kept a horse, and sometimes hunted with his father's hounds (Harrison v. Fane, 1 Mann. & Gr. (39 E. C. L.) 550); nor a stanhope for the son of a clergyman of small fortune (Charters v. Bayntern, 7 Carr. & P. (32 E. C. L.) 52); nor a silk dress for a female servant (Hedgeley v. Holt, 4 Carr. & P. (19 E. C. L.) 104); nor soda-water, oranges, jelly, biscuit and pastry for a university student, unless under special circumstances of health or other peculiar necessity (Brooker v. Scott, 11 Mess. & W. 67); nor articles supplied to an under-graduate at Oxford, the son of a man of position, for *dinners* in his own rooms (where he received parties of friends); nor fruit, confectionary, &c., furnished the same party (Wharton v. McKenzie, 5 Ad. & El. N. S. (48 E. C. L.) 606). We have seen that such articles as are *merely ornamental* are never necessities for any one, whatever his wealth or station. To this class *finger-rings* have been held to belong, whilst a watch, watch-chain, and breast-pin, even though very expensive, have been regarded as having so much utility as to constitute them necessities, when they are adapted to the station and fortune of the infant purchaser. So that the practical question is, whether the articles were bought for *mere ornament*, or for *real use*. If the former, the infant can in no case be subjected to pay for them; if the latter, he may be, provided they are, in character and cost, adapted to his means and station. (Peters v. Fleming, 6 M. & W. 47; 3 Rob. Pr. (2d Ed.) 236.)

Money lent to an infant to buy necessities, although it *be so expended*, is yet not recoverable *at law* (because the law distrusts his discretion to lay out the money judiciously); but *equity* will *subrogate* (*i. e.* substitute) the lender to the right of him who furnished the necessities, who was paid with the lender's money. (1 Bl. Com. 466,

n (17); Chit. Cont. 151; Marlow v. Pitfield, 1 P. Wms. 559; 1 Am. L. C. 249.) And as an infant is not liable at law for money lent him to buy necessities, because he has not sufficient discretion to apply it judiciously, so *a fortiori* is he deemed incompetent to conduct any business, and, therefore, is not liable for goods furnished for that purpose, even though it be a trade by which he gets his living. (1 Bl. Com. 466, n (17); Bac. Abr. Infancy (I), 1; 1 Am. L. C. 249.)

And upon like considerations, an infant, in order that he may be effectually protected from wrong, cannot contract to pay even for necessities in such a form as will preclude enquiry into the price and value of the consideration. He cannot, therefore, make any bargains for a price which shall bind him *absolutely*. Whatever form the contract may assume, whether that of a bond, of a promissory note, or of an account stated, it is to be regarded in law as no more than an engagement to pay the *true value* of the articles, &c. It has, therefore, been sometimes said that no action will lie against an infant on *any security*, although the consideration was *necessaries*. This, however, appears to be a misapprehension. The true doctrine is believed to be that the action may be maintained on the security; and if infancy is pleaded and proved, nothing can be recovered but the *just value of the necessities*. (1 Pars. Cont. 260-'61; Bac. Abr. Infancy (I), 1; 1 Am. L. C. 248.)

An infant is as much liable for necessities furnished persons for whom he is legally bound to provide as for those furnished to himself,—as his *wife and children*, &c. But he is not liable for necessities for a wife, bought by him *before marriage*, although his wife afterwards used them. (1 Bl. Com. 466, n (16); Turner v. Trisby, 1 Stra. 168; 2 Kent's Com. 240; Chapple v. Cooper, 13 M. & Wels. 252, 259-'60.) In the case last mentioned of Chapple v. Cooper, (13 M. & W. 252, 259-'60), a remarkable illustration of this principle was afforded. An infant widow ordered a funeral for her husband, who died without property; but the undertaker having delayed for a time to present his bill, her grief and respect were so mitigated that she refused to pay it; whereupon he brought an action, and it was held that



*she was liable*, because being by the law made, through the marriage, *one with the husband*, and decent burial being a necessary *for him*, it was a *personal benefit to her*! It is another noteworthy corollary from this proposition, that if an infant marries a wife who is indebted, he becomes by the marriage liable in law for all her ante-nuptial debts, against which his infancy constitutes no defence. (1 Pars. Cont. 245, & n (j).)

Where an infant lives with, or under the control of his parent or guardian, no credit is ever *implied as given to him*. It is presumed to have been given to the parent or guardian, and in order to charge the infant, it *must be proved* not to have been given to them, *but to him*. (Bac. Abr. Inf'y (I) 1; Bainbridge v. Pickering, 2 Wm. Bl. 1325.)

### 2<sup>1</sup>. Contracts of Marriage Settlement.

Contracts of marriage settlement, so far as they relate to *personal property*, are valid as against *infant parties* thereto—(1), Because they tend to promote marriage, which is not only advantageous to the State, but eminently favorable to the respectability and happiness of the parties; and (2), Because in the case of *females especially*, they protect the property of the party from the *marital rights* of the consort. (1 Pars. Cont. 277-'8, & n (t); Tabb v. Archer, 3 H. & M. 399, 408, 422; Healy v. Rowan, 5 Grat. 430; Milner v. Harewood, 18 Ves. 259, and notes.)

Such contracts are to be made always by the infants themselves, and not by their guardians in their behalf, and in the latter case are inoperative and void. (Healy v. Rowan, 5 Grat. 430.)

The validity of marriage settlements by infants *touching lands* is not fully determined in England, although no doubt seems to be allowed in Virginia that such settlements *are valid*. (Atherley, Marr. Settlements. 28, &c.; Milner v. Harewood, 18 Ves. 259, and notes; 1 Pars. Cont. 277, n (t); Tabb v. Archer, 3 H. & M. 399; Healy v. Rowan, 5 Grat. 430.)

### 3<sup>1</sup>. Contracts of *Apprenticeship*.

As an infant may bind himself to pay "for good teaching or instruction, whereby he may profit himself afterwards," it would seem that he must be bound by a contract of apprenticeship, being peculiarly beneficial to him in its general nature, and so it seems to be admitted; but it is

held, notwithstanding, that independently of statute, no action of *covenant* lies, nor any other action, nor any remedy in equity *against him*, upon the indenture of apprenticeship; and the only *judicial* remedy open to the master for a breach by the infant of the contract appears to be by action of covenant against the *infant's friend*, who commonly joins in the indenture, or by an appeal to the statutory police jurisdiction of the county court, which has power (V. C. 1873. c. 122, § 12) to compel the infant specifically to fulfil his contract of service. (Bac. Abr. Master, &c. (B) 1; 1 Th. Co. Lit. 175, 177, & n (40); Gylbert v. Fletcher, 4 Cro. (Car.) 179; King v. Cromford, 8 East. 26; 1 Am. L. C. 232-'3; 1 Pars. Cont. 262, n (e).)

In Virginia it is expressly declared by statute (V. C. 1873, c. 122, § 15), that "if an apprentice bound in this State desert the service of his master, he shall be liable, *notwithstanding his infancy*, for all damages sustained by such desertion." But as under the corresponding statute of 5 Eliz., c. 4, § 43, it was held that no remedy lies against an infant *upon the covenants* contained in the *contract of apprenticeship* (Gylbert v. Fletcher, 4 Cro. (Car.) 179; Bac. Abr. Master, &c., (B) 1), it is not improbable that a similar construction will be given to our statute in Virginia. See *ante*, 184.

Contracts of service not amounting to apprenticeship are like the great body of infant's engagements, *voidable* at the infant's election. (Moses v. Stevens, 2 Pick. (Mass.) 332; Nickerson v. Easton, 12 Pick. 110.)

- 4<sup>1</sup>. Contracts to do what the *law obliges the infant to do* at all events.

Such a contract is beneficial to the infant inasmuch as it may exempt him from the annoyance of a suit, and sometimes from pecuniary costs. "Whatsoever," says Lord Coke, "an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." (1 Th. Co. Lit. 176-'7; 1 Pars. Cont. 263; 1 Am. L. C. 249-'50.)

To this class belong assignments of dower by infant heirs, and partitions between co-parceners (co-heirs), or other co-tenants who are compellable to make partition, all of which are binding upon infants, provided they are fair and reasonable. (2 Insts. Com. & Stat. L. c. viii, xii; Zouch v. Par-

sons, 3 Burr. 1801, 1803, 1808; Baker v. Lovett, 6 Mass. 80; Vent v. Osgood, 19 Pick. 575; 1 Am. L. C. 250.)

Upon this principle also contracts to perform *military service* for one's country are binding on infants. Every one physically capable is bound in law, as in duty, to serve his country as a soldier, when required or invited so to do, and therefore, if the act of the Legislature, under which the enlistment is made, *does not except minors*, any one, though a minor, who accepts the offers of the State is *himself* bound thereby; however, a third person, such as the master, if the minor be an apprentice, may intervene, and insist upon his prior claim to the infant's services. (United States v. Cottingham, 1 Rob. 615; United States v. Blakenay, 3 Grat. 405; United States v. Lipscomb, 4 Grat. 41; 1 Am. L. C. 250.)

Upon like principles an infant is liable upon a *bastardy bond*; and so where a father purchased land in the name of his infant son, in order to defraud his creditors, and afterwards sold it to a purchaser for valuable consideration without notice, to whom the infant, at his father's instance, conveyed the legal title, it was held that after age he could not avoid his conveyance, because having nothing but the legal title, and no equity, as against a creditor or an innocent purchaser for value, he had, by his conveyance, done merely what a court of equity would have compelled him to do, and which, if it were disaffirmed by him, he would be compelled to do again. (1 Pars. Cont. 263; 1 Am. L. C. 250; People v. Moores, 4 Denio (N. Y.), 519; Elliott v. Horne, 10 Ala. 348, 353.)

Hence also, as we have seen, an infant husband is liable for his wife's *ante-nuptial* contracts, it being the *legal result* of the marriage. (Bac. Abr. Inf'y (I), 3; Slocombe v. Grubb, 2 Bro. C. C. 551; Roach v. Quick, 9 Wend. (N. Y.) 238; Butler v. Breek, 7 Met. 164.)

2<sup>k</sup>. Contracts of Infants *which are void*.

Contracts which it is *prejudicial to infants, in general*, to allow them to bind themselves by are *void absolutely*. And this is determined by the *nature of the contract in general*, and not upon any accidental circumstances of loss or profit connected with the transaction, much less upon the wishes of the minor himself.

Formerly this class was considered to include all *powers of attorney*, all contracts involving *penalties and forfeitures*, all *releases and conveyances* executed to *guardians*, all *negotiable securities*, and all *accounts stated*. (2 Kent's Com. 235; 1 Pars. Cont. 621; Th. Co. Lit. 175; Zouch v. Parsons, 3 Barr. 1804; Trueman v. Hurst, 1 T. R. 40; Williamson v. Watts, 1 Campb. 552; Swansey v. Vanderheyden, 10 Johns. 33; McMinn v. Richmond, 6 Yerg. (Tenn.) 1); but a very decided tendency exists to circumscribe the number of instances of *void contracts*, and to hold them rather to be *voidable* at the infant's election, especially as, if they are *void*, they are, upon the principle of a *want of mutuality* (mutuality being a necessary element in every contract), as much void in respect to the opposite party as to the infant; whereas, if treated as *voidable*, the minor, at his option, may avoid them after coming of age, whilst the adult party is bound; and hence it is better *for the infant* that the contract should be voidable than void. In view of these considerations, it is believed that at present none of an infant's transactions are *absolutely void* except *powers of attorney*, including *agencies of all sorts*, sought to be created by minors. (Zouch v. Parsons, 3 Burr. 1806; Williams v. Moor, 11 Mees. & W. 266; Thomas v. Roberts, 16 Mees. & W. 780-'81, and cases cited in note; 1 Am. L. C. 250-'51.)

The reason for holding *powers of attorney* and *agencies* to be *absolutely void*, instead of merely voidable, may be seen, 1 Am. L. C. 250. It is refined, and not wholly satisfactory, but whatever may be thought of the considerations suggested as the foundation of the rule, the rule itself is believed to be established by a conclusive weight of authority. The reason is stated thus: the constituting of an attorney by one whose acts are in their nature voidable, is repugnant and impossible, for it is imparting a right which the principle does not possess,—that of doing valid acts. If the acts, when done by the attorney, remain voidable in the option of the infant, the power of attorney is not operative according to its terms; if they are binding, then he has done, through the agency of another, what he could not have done directly,—binding acts. The fundamental principle of law, in regard to infants, requires that the infant should have the power of affirming such acts done by the attorney as he

chooses, and avoiding *others* at his option ; but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney ; and if he ratifies the power, all that was done under it is confirmed. If he affirms part of a transaction he at once confirms the power, and thereby against his intention affirms the whole transaction. Such personal and discretionary legal capacity as an infant is vested with is therefore, in its nature, concluded to be incapable of delegation. Accordingly, a power of attorney by an infant to sell land is *absolutely void* (Lawrence v. McAster, 10 Ohio, 37, 42 ; Pyle v. Cravens, 4 Littell (Ky.), 17, 21) ; and so also is a warrant of attorney to confess judgment. So that a judgment entered upon it will be set aside upon motion. (Bennett v. Davis, 6 Cow. 393 )

It is important to observe that, although any given assurance *be void*, and much more if it be voidable, if the original consideration were *necessaries*, there may be a recovery at all events on such consideration ; and that it is, therefore, expedient in all cases of that kind to have two *counts* (as they are called) *in the declaration*, or complaint ; one on the instrument containing the promise, whether bond or note, and the other on the promise which the *law implies* from the consideration of necessaries furnished. (2 Kent's Com. 239 ; Russell v. Lee, 1 Lev. 86 ; Stone v. Denison, 13 Pick (Mass) 7 ; McMinn v. Richmond, 6 Yerg. 1.)

It is not amiss, in conclusion of this point, to remind the student that by the Statute of Wills an infant is not empowered to make a will of *lands*, and that such a will is therefore *absolutely void*, and incapable of confirmation, otherwise than by a re-execution after coming of age, with all the ceremonies of an original will, as, indeed, it is. (V. C. 1873, c. 113, § 3 ; Herbert v. Tarbol, 1 Keb. 589 ; S. C. Sid. 162.)

### 3<sup>k</sup>. Contracts of Infants which are *Voidable*.

Where nothing can, with certainty, be predicated of a class of contracts whether it will be *advantageous or hurtful* to infants to be allowed to bind themselves thereby, they are *voidable* at the election of the infant who makes them, in order that he may have the means of protecting himself against the natural consequences of his inexperience and indiscretion. But until the infant exercises this extraordinary privilege with which the law endues him

for his protection, the contract is binding upon him,—if that can be called an *obligation* which, when he arrives at age, he may repudiate at pleasure. Were it not so, the contract would be wanting in *mutuality* (which, we have seen, is an essential element of a contract in all cases), and would, therefore, be no more binding on the adult party than on the infant. But that would be contrary to the well established doctrine which holds such contracts, although they may be voidable by the *infant party*, yet to be always obligatory upon the adult. (Bac. Abr. Inf'y (I), 4; Holt v. Clarendieux, 2 Stra. 937.)

This class of infant's contracts is by far the most numerous of all. It embraces the great bulk of transactions in which either infants or other persons can be engaged,—such as bonds *not involving* a penalty or forfeiture, and, according to the latter doctrine, such also as do (1 Th. Co. Lit. 176; 2 Kent's Com. 235-'6; Russell v. Lee, 1 Lev. 86; Zouch v. Parsons, 3 Burr. 1805; Baylis v. Dinely, 3 M. & S. 481); promissory notes *not negotiable*, and by the latter doctrine such also as are negotiable (2 Kent's Com. 235-'6; Wamsley v. Lindenberger & Co., 2 Rand. 478); agreements to submit disputes to arbitration; which, however, as partaking of the *nature of powers*, may possibly be held to be void (Bac. Abr. Inf'y (I), 3; Warwick v. Bruce, 2 M. & S. 209); conveyances of lands or chattels Zouch v. Parsons, 3 Burr. 1805; Baker v. Lovett, 6 Mass. 80; Worcester v. Eaton, 13 Id. 371; Wheaton v. East, 5 Yerg. 41; Mustard v. Wohlford, 15 Grat. 329); contracts for *personal service*, other than apprenticeship (Moses v. Stevens, 2 Pick. 332; Vent v. Osgood, 19 Pick. 572; Micherson v. Easton, 12 Pick. 110); contracts to marry (Bac. Abr. Inf'y (I), 3; Holt v. Clarendieux, 2 Stra. 938; Hunt v. Peake, 5 Cow. (N. Y.) 475; Willard v. Stone, 7 do. 22); and, in short, the great body of *contracts and assurances* of all kinds (2 Kent's Com. 235-'6; Oliver v. Hondlet, 13 Mass. 237; Whitney v. Dutch, 14 Id. 257; Jackson v. Carpenter, 11 Johns. 539.)

The privilege of an infant to repudiate a voidable contract is a *personal* privilege, confined to himself and his representatives, and of which no one else can take advantage. Thus, if an infant payee of a note endorse it, in an action by the endorsee against the maker, the latter cannot

set up, as a defence, the endorsee's infancy, as showing that the endorsement conferred no title; nor can the creditors of an infant grantor avoid the conveyance on the ground of the grantor's infancy. (1 Pars. Cont. 207, 276; Bac. Abr. Inf'y (I), 6; Zouch v. Parsons, 3 Burr. 1807; Keane v. Boycott, 2 H. Bl. 511; 1 Am. L. C. 253; Oliver v. Hondlet, 13 Mass. 237; Nightingale v. Withington, 15 do. 272, 371; Kendall v. Lancaster, 22 Pick. 540.)

And much less can the *other contracting party* elect to avoid the agreement (Holt v. Clarencieux, 2 Stra. 937.) And, therefore, if one contract with two persons, of whom one is an infant and the other adult, it is not proper to sue the *adult only* (as is the English practice), for that would be for the *plaintiff* to exercise the privilege of avoiding the infant's contract, which the infant alone can do; but both should be sued; and if the infancy of one of the promisors be pleaded and proved, it will not prevent a recovery against the adult. (Wamsley v. Lindenberger, 2 Rand. 478; Woodward v. Newhall, 1 Pick. 500; 1 Am. L. C. 253.)

And this constitutes a prominent diversity between *contracts voidable* and *contracts void*. Voidable contracts can be avoided by the *infant party alone*, or his representatives, whilst void contracts are no more binding upon the opposite party, though adult, than they are on the infant; a consideration which, as already suggested, makes it proper, for the benefit of infants, to incline, in doubtful cases, to the construction that contracts are *voidable* rather than *void*. (2 Kent's Com. 235-'6; Zouch v. Parsons, 3 Burr. 1805.)

Since infancy does not generally avoid a contract *absolutely* (as coverture does), it is not in those cases provable under the plea of *non est factum*; but as it enables the infant, at his pleasure, to avoid the demand, it is available under the plea of *non assumpsit* or *nil debet*. (1 Am. L. C. 253; 1 Chit. Pl. 519; Id. 511, 516; Steph. Pl. 162, n (20).)

## 2<sup>d</sup>. Doctrine as to *Confirmation* of Contracts of Infants.

Confirmation applies not to contracts which are *valid*, for they do not require it; nor to contracts which are *void*, for they are incapable of being confirmed; but it is applicable *exclusively* to *contracts voidable*. (Chit. Cont. 152; Bac. Abr. Inf'y (I), 8.)

The doctrine of confirmation is that, in the case of a *voidable contract*, the infant, either during his min-



ority or within a competent time after he becomes of age, may avoid the contract if he will; or when he reaches the age of twenty-one, if he shall so elect, he may *confirm it*. (1 Pars. Cont. 243, 269, & seq.; Bac. Abr. Inf'y (I), 8.) He who deals with an infant deals at his peril, and subject to the right of the infant thus to avoid the transaction.

And this right of confirmation or avoidance on the infant's part is paramount and absolute, prevailing not only against the original party on the other side, but also against any one claiming under him, although it be as an innocent purchaser for value. (2 Am. L. C. 259; Mustard v. Wohlford, 15 Grat. 340.)

Nor is the infant's right to avoid the contract affected by the fact that the other party supposed him to be of age; nor that he was engaged in business, and was accustomed to make contracts; nor even that he *fraudulently represented himself* to be of age. (1 Am. L. C. 252.) But in the latter case, although the other party cannot recover *upon the contract*, he may maintain an action *for the fraud*, to which infancy is no defence. (1 Pars. Cont. 265-'6; Bac. Abr. Inf'y (I), 3; Com. Dig. Actions (A, 10); 2 Kent's Com. 241.)

It is not to be understood that because an infant's contract may be *avoided by him*, it is, therefore, void as to him, *until he confirms it*. On the contrary, it is *valid and binding* until he *repudiates it*. Otherwise there would be a want of *mutuality*, which would discharge the opposing adult promisor, as well as the infant. The contract is a complete one as soon as made, but with the privilege to the infant, in order that he may protect himself against impositions and his own imprudence, to annul it at his discretion, if he shall elect so to do.

As to the precise *terms of ratification*, the authorities at common law are so little in accord one with another in respect to the language which shall fix the infant's liability, after coming of age, and determine his election, as to suggest a statutory provision as the best means to harmonize the doctrine. Such an enactment has been resorted to both in England and in Virginia; but instead of prescribing *the terms*, or the *character* of the confirmation, the statute in either country only directs the *medium* through which alone it *shall be proved*—namely, that it shall be *in writing, signed by the party to be charged*, instead of being by word of mouth merely. Independently

of statute, the infant's ratification may be *by parol*, and that (according to the better opinion) even where the original promise is *under seal*, although the contrary opinion is sustained by an authority so eminent as Lord Ellenborough. (*Baylis v. Dineley*, 3 M. & S. 482.) The doctrine stated, however, is supported by the whole weight of the American decisions. An infant's *bond* is considered a valid obligation, unless after age *he elect to avoid it*; and as the confirmation after age is the *exercise of this right of election*, it effectually precludes him from exercising it again in the opposite direction, by his plea of infancy. The confirmation does not impart to the contract what did not exist in it before, but divests it of the quality of *voidableness*, which originally belonged to it, simply because the choice, which can be exercised but once, has been made; and it is apparent that this result must ensue under like circumstances, whether the contract be by parol or under seal. (1 Am. L. C. 255-'6.)

But whilst independently of the statute alluded to (V. C. 1873, c. 140, § 1) the confirmation may be by parol, and may be signified either *by words or by conduct*, it must be yet *clear and unequivocal*. It must also be before the commencement of the suit, and must be voluntary, deliberate and intelligent; and if conditional, it must appear that the condition has been fulfilled. It has been said, also, that it must be made to the *other party himself, or his agent*, and not to a stranger. It would seem, however, that a confirmation to a stranger would be *satisfactory proof* of a new promise to the party himself, just as is a clause in a will directing all just debts to be paid; or, as is a conveyance after age, *subject to a mortgage* made during infancy, a confirmation of the latter. (1 Pars. Cont. 269-'70, & n (a); 1 Am. L. C. 253-'4; *Merch'ts & F. Ins. Co. v. Grant*, 2 Edw. (N. Y.) 554; *Boston B'k v. Chamblin*, 15 Mass. 220.)

No particular form of words is required to make a confirmation. It suffices that they import an unequivocal *recognition and confirmation* of the previous engagement; and they need not amount to a *direct promise to pay*. "I have not the money now, but when I return I will settle with you" (*Martin v. Mayo*, 10 Mass. 137); "I will pay it (the note) as soon as I can make it, but not this year" (*Bobo v. Hansell*, 2 Bailey, (S. C.), 114); "I will endeavor to

procure the money, and send it to you" (Whitney v. Dutch, 14 Mass. 457); "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time" (Hartley v. Wharton, 11 Ad. & El. (39 E. C. L.) 934);—all these have been decided to be *sufficient ratifications*. See, also, 1 Pars. Cont. 270, n (a);—Harris v. Wall, 1 Excheq. 122; Best v. Givens, 3 B. Monroe (Ky.), 72.

On the other hand, these expressions,—“I owe the debt, and you will get your pay, but I *will not give a note*” (Hale v. Gerrish, 8 N. H. 374); “I owe you, but am unable to pay, but will endeavor to get my brother bound with me” (Ford v. Philips, 1 Pick. 202); “I consider your claim worthy of my attention, but not of my first attention, but I will soon give it the attention due it” (Wilcox v. Rowth, 12 Conn. 550); have been held to be *not sufficient ratifications*. (1 Pars. Cont. 270, & n (a).)

Independently of statute, an infant may manifest a confirmation of his contracts after coming of age, as well by *his conduct* as his *words* (Bac. Abr. Inf’y (1) 8); as by enjoying or claiming the benefit or advantage under a contract or transaction, which he might have wholly rescinded (Barnaby v. Barnaby, 1 Pick. 221, 223). Thus, in case of a contract of service made during infancy, if the infant after coming of age, enjoy the benefit of the contract on his side, he must perform its stipulations on the other. And hence, where the contract is *entire*, if the infant in any manner confirm in part, the whole is confirmed. Thus, an infant having sold a house with warranty, and taken the purchaser’s note for the price, after coming of age sued on the note, and was held thereby to have confirmed the warranty, which was part of the entire contract of sale. So it is said, if an infant partner, after age, transacts the business of the firm, and receives the profits, he thereby confirms the contract of partnership, and becomes bound for all the previous liabilities of the firm, although not known to him. But a *partial payment* is not a ratification of the residue, nor is a mere omission for a considerable time after coming of age, to disaffirm the contract. (1 Am. L. C. 256; 1 Pars. Cont. 270–’71.)

In respect to *continuing contracts*, however, such as contracts of partnership, of lease, &c., an omission, for a considerable time after coming of age, to dis-

affirm the contract will subject the infant to answer for all the liabilities accruing by reason of such continuing contract, after the termination of his minority. Thus, if an infant enter into a contract of partnership, and upon coming of age he does not promptly repudiate it, he will be liable, by reason of the partnership, for all the transactions then or afterwards occurring, although personally not cognizant of them. (Bac. Abr. Inf'cy (K), 8; R'way Co. v. McMichael, 5 Excheq. 127; Evelyn v. Chichester, 3 Burr. 1719.)

In regard to the confirmation of infant's *executed contracts*, implied from conduct after coming of age, there is a difference between the case of a *sale* and a *purchase* made by him, and perhaps, also, between the purchase of *lands* and the purchase of *chattels*. The governing principle in all cases is that to appropriate, after full age, any benefit arising from a contract entered into during infancy, *confirms it*.

Such appropriation is more likely to occur in the case of a *purchase* than of a *sale*, and in the case of a purchase of *land* than of *chattels*, which are very liable to be lost, sold or consumed during non-age; but the same general doctrine *applies to all*. (1 Am. L. C. 256-'7-'8.)

With respect to the time and manner of avoiding contracts by infants, a distinction is to be observed between *sales of lands*, on the one side, and contracts of a *personal kind*, or relating to *personal property*, on the other. In cases of *sales of lands*, the infant may enter *under age*, and hold or take the profits, but he cannot *conclusively* and finally avoid the conveyance until he is of age. The avoidance may then be by entry on the premises, by an action of ejectment to recover them, or by any act unequivocally manifesting an intent to avoid. Even a *re-sale* after age to another person will avoid a previous conveyance where (as in Virginia, V. C. 1873, c. 112, § 5; Carington v. Goddin, 13 Grat. 587,) one out of possession is allowed by law to convey land. The first vendee's title being then disaffirmed and annulled, both in law and equity, the second purchaser, who bought after the infant attained his age, may recover. This supposes, of course, that the two conveyances are incompatible the one with the other; for if they can stand together, the last affords no evidence, at least intrinsically, that the infant meant to repudiate the first. (1 Am. L. C. 259; Mustard v. Wohlford, 15 Grat. 329, 335; Frost v. Wolverton, 1 Stra. 94;

Tucker v. Moreland, 10 Pet. 58.) It will be remembered, also, that it is a part of the infant's privilege to avoid his contracts, not only against the party originally contracting with him, but also against persons claiming under such party, even against a *bona fide* purchaser for value from the grantee. (1 Am. L. C. 259; Mustard v. Wohlford, 15 Grat. 329.)

Contracts of a *personal kind*, or relating to *personal property*, on the other hand, may be *immediately avoided* without waiting for the minor to attain his age, and that finally and *conclusively*; because otherwise irreparable injury might ensue. And the avoidance may be by any act clearly demonstrating a renunciation of the contract, as in case of a contract to serve, leaving the service and going elsewhere. (1 Am. L. C. 259.)

As to the consequences of an infant's avoidance of his contracts, we must distinguish between such as are *executory* on his part, and those which are *executed*.

Where the contract is *executory*, on the infant's part, he may always avoid it, supposing it to be of a voidable nature; but whatever consideration he may have received, if it be still in his *possession or control*, he must return it. He may protect himself by his infancy against advantages which otherwise might be taken of his incapacity and want of experience, but it is not to be employed to procure a benefit for himself at the expense of other persons. He cannot repudiate the contract (which is really to *annul and revoke it*), and at the same time retain what the contract alone *gives him any right to*. If, indeed, the *consideration*, whether it be money or property, has been spent, consumed, or has otherwise ceased to be in his possession, or under his control before he arrives at age, he is not to be prevented from avoiding his contract because he cannot or does not restore the consideration. To exact such a condition would in very many, if not in most cases, defeat the design of the law in making such promises voidable. It would suppose the existence, on the part of the infant, of those very qualities of providence and care, the absence of which obliges the law to protect him by making the contract voidable. His refusal after age to restore the consideration, if he *still has it*, is an *affirmance* of the contract; and his plea of infancy is a *rescission of it*, and therefore *revests* in the other party a *title to the consideration*, supposing the infant to be in possession of it. But if it be not then

in possession, by reason of the same having been spent, consumed, or aliened by the infant during his minority, the omission to restore it affords no cause of action against him, because he is prevented from doing so by what took place during infancy, when the contract was in full force, and when it was lawful for him to do with the subject what he would. (1 Am. L. C. 259-60; *Mustard v. Wohlford*, 15 Grat. 329, 340, & seq.)

Where the contract is *executed* in whole or in part, on the side of the infant, he may, it seems, *rescind the agreement* and recover the money or property advanced, or a proper compensation for the work done by way of consideration, but *in no case* without restoring to the other party the *equivalent received*. Thus, if an infant has *paid money* for a horse, or given in exchange another horse, and upon coming of age, chooses to avoid the transaction, he may do so, and receive back the price, &c., but *only on condition* of re-delivering the horse; and if that condition be impossible because the horse is no longer in his power, he cannot oblige the other party to pay him back the money. This doctrine is well illustrated in the two noted cases of *Holmes v. Blogg*, 8 Taunt. (E. C. L.) 509, 37, and *Corpe v. Overton*, 10 Bingh. (25 E. C. L.) 252; and is further illustrated by the case where the infant has engaged to labor for a certain period, and after doing some work abandons the job; when, according to the weight of authority, he is allowed to recover in general, upon a *quantum meruit* for the work he has done, instead of upon the contract, and that without abatement for any injury he may have occasioned by the failure to complete his contract. (3 Rob. Pr. (2d Ed.) 223-'4; 1 Pars. Cont. 268, 263; 1 Am. L. C. 260-'61.)

Whilst this is the rule in respect to *contracts executed*, in general, and especially contracts of *purchase* by the infant, a different measure of justice prevails where the minor seeks to rescind a *contract of sale*. It is obvious that to exact in this case the return of the purchase money by the infant, would be, in fact, to deny him, in most cases, the benefit of his infancy. (3 Rob. Pr. 227-'8; *Mustard v. Wohlford*, 15 Grat. 342.)

The avoidance of the contract on the infant's part, whether it be executed or executory, *must be entire*, or it does not operate at all. He cannot pretend to

rescind so much as he may deem adverse to him, whilst he claims the benefit of what is in his favor. Thus, if he buy land, and execute bonds for the purchase money, upon coming of age he cannot plead infancy to the bonds, whereby he disaffirms the *whole contract*, and at the same time claim the land. (1 Am. L. C. 261-'2.)

Allusion has repeatedly been made to a statute with us taken from 9 Geo. IV, c. 14, § 5, which directs that the confirmation of infant's contracts shall be *in writing*. The enactment (V. C. 1872, c. 140, § 1), is that "no action shall be brought to charge any person upon a promise after full age to *pay a debt* contracted during infancy, or upon ratification after full age of a *promise or simple contract* made during infancy, unless the promise or ratification, or some memorandum or note thereof, be in writing, and signed by the party to be charged thereby, or his agent." The non-adaptation of this statute to the mischief in view has been already stated. Its effect,—perhaps inadvertently,—seems to be limited to contracts to *pay money*, whether under seal or not, and to contracts to *do collateral things* (*i. e.*, something else than to pay money), only when the engagement is a *simple contract not under seal* (the word *promise* properly importing an undertaking *by parol* or *not under seal*.) (2 Steph. Com. 108; Burr. L. Dist. Promise, 7.) When the undertaking is to do a *collateral thing under seal*, the statute appears inapplicable, and if so, the confirmation of such transactions may be as at common law.

It is too remarkable to be passed by without notice, that the common law holds all an infant's contracts *by matter of record* (such as recognizances, judgments, &c.), to be for the most part voidable *only* during the *party's minority*, because non-age, in order to avoid the solemnities of such a transaction, can be tried *only by inspection by the court*, and not by a jury. (1 Th. Co. Lit. 178-'9; Bac. Abr. Inf'y (8); 2 Kent's Com. 237; Randall v. Wade, Yelv. 88; Harrison v. Worley, 2 Dyer. 232.)

3<sup>1</sup>. The Acts for which Infants are liable, notwithstanding their Infancy.

Infants are liable, notwithstanding their non-age, for mere *torts*—that is, injuries other than such as arise *out of the breach of contracts*—just as an adult is. "If an infant commit an assault or utter a slander," said Lord Kenyon, in Jennings v. Rundall, 8 T. R.



337, "God forbid that he should not be answerable for it in a court of justice." Nor does it acquit him of liability that he acted by command of another person, or through an agent. For all manner of torts—trespass, assault, slander, fraud, wrongful conversion where there is no contract, &c.—he is incontestibly responsible in an action. Thus, an infant who obtains goods fraudulently, without intending to pay for them, is liable *for the fraud*—that is, for the value of the goods; and in general, where money or goods have, *without contract*, gone into an infant's hands wrongfully, as by embezzlement, or are retained by him wrongfully, they may be recovered. (1 Pars. Cont. 264; 1 Am. L. C. 262; Bac. Abr. Infcy (H); Bristow v. Eastman, 1 Esp. 173; Mills v. Graham, 1 Bos. & Pull. N. R. 144; Vasse v. Smith, 6 Cr. 226.)

There are, however, transactions so ambiguous that they may very well be regarded either as torts or as breaches of contract; but it may well be conceived that it is not at the option of the other party to make an infant responsible or not for a transaction, by treating it as a tort or as a contract. The liability of an infant wrong-doer is in such case determined not by the caprice of the plaintiff, but by the *prevailing character* of the injury, or, as it has been sometimes expressed, on whether a liability can be made out *without taking any notice of the contract*. If that *prevailing or predominant character* be *tort*, the infant is answerable; whilst if the predominant character be *contract*, the infancy is a defence. And it would seem (Bristow v. Eastman, 1 Esp. 173) that whether the plea of infancy is to be admitted or not depends not, in either case, *upon the nature of the action*; so that whilst, on the one side, infancy is allowed as a bar to an action of *trover* or of *detinue* (although they are actions of *tort*), when the character of *contract* predominates in the business out of which the action arises; so, on the other side, infancy will be no answer to an action of *assumpsit* or of *debt* (although they are actions of *contract*), where the *predominant element* is *tort*.

Thus, if the *bailee* of a chattel (*i. e.* a person to whom the chattel is delivered for some specific purpose, as to use, to carry, to repair, &c.,) treat it so *negligently* that injury results, the bailor may in general, at his option, regard the wrong either as a *breach of the contract* of bailment, or as a *tort*. And

so, upon a breach of *warranty of the quality* or title of a chattel, when the defect is known to the warrantor, the sufferer may, at his election, treat it as a *violation of contract* or *as a deceit*, and, therefore, a *tort*. But it is manifest that in both these cases the *predominant character* of the transaction is *contract*, and *not tort*; and, therefore, if the wrong-doer be an infant, he is not to be ousted of his defence of infancy by the plaintiff electing to treat the matter as a tort. On the other hand, if the bailee *wilfully* injure the thing bailed, or if he pervert it from its destined use (as if he puts a horse *in the plough* which he hired to ride, or having hired a horse to go to a place agreed, he goes to another place in a different direction), the bailment may be considered as thereby *terminated*, which makes the bailee thenceforth a *trespasser*; or in his election, waiving *the tort*, the bailor may regard the bailee as still in possession, and liable under the *contract* of bailment. In this instance the *predominant character* of the transaction is *tort*, and *not contract*; and the wrong-doer's *infancy is no defence*. (1 Am. L. C. 262-'3; 1 Pars. Cont. 264; 1 Chit. Pl. 87; Chit. Cont. 151, n (3); Jennings v. Rundall, 8 T. R. 337; Johnson v. Pie, 1 Lev. 169; Homer v. Thwing, 3 Pick. 492; Vasse v. Smith, 6 Cr. 226; Green v. Greenbank, 2 Marshall, (4 E. C. L.) 485.)

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## CHAPTER XVIII.

### OF CORPORATIONS.

#### 2<sup>a</sup>. The Rights which relate to Corporations, or Artificial Persons.

It will be remembered that at the very beginning of the discussion of the *rights which relate to the person*, a distinction was adverted to (*Ante* p. 51) between the rights which concern the person in respect to *natural persons*, and those which concern *artificial persons*,—bodies politic, or *corporations*. To this latter topic we are now come.

From the exposition thus far made of the rights and duties which relate to the person in respect to *natural persons*, it is apparent that the contrast between them and *artificial persons* cannot, in general, relate to any rights which concern *the person*, whether absolute or relative, but to those rights only, or at least *chiefly*, which are connected with *property*. The

It would be requisite in order to invest a *series of* one after another, in indefinite succession, with the legal rights with regard to property, would be very difficult, if not impracticable. And therefore, as well as for other reasons, which will be mentioned in the sequel, it has been found expedient, when it is desired to have a particular class of property or of rights kept on foot, and for a length of time, to constitute such artificial bodies politic, who may maintain a perpetual succession and enjoy a kind of legal immortality. (1 Bl. Com. 267, &c.; Bac. Abr. Corporations; Angell on Corporations.\*)

In treating the subject, it will be expedient to treat it under the following principal heads, viz:

Origin and Nature of Corporations;  
 Several Kinds of Corporations;  
 Creation and Organization of Corporations;  
 Modes of Action, and the Powers of Corporations;  
 Relation of Members to the Corporation;  
 Visitation of Corporations;  
 Judicial Proceedings Employed to Restrain and Regulate Corporations in the Exercise of their Franchises; and  
 Dissolution of Corporations;

**Origin and Nature of Corporations.**

A corporation is a *mere creature of the law*, invisible, intangible, and incorporeal. It is defined by Chancellor Kent as "a franchise possessed by one or more individuals, who are united into a body politic, under a special denomination, and authorized by the policy of the law with the capacity of *perpetuity*, and of acting in several respects (however the association) *as a single individual*." (2 Kent's Com. 308; 1 Browne's Civ. & Adm. Law, 141; Bank of U. S. v. Bank of Ala., 5 Cr. 61.)

Chancellor Kent also describes the object of the institution as to enable the members to act by one united will, and to use their joint powers and property in the same manner, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals, however many, composing a corporation, and their acts, are considered in law but as *one moral person*, under an artificial form, of *taking and conveying*, *contracting debts* and duties, and of enjoying a

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An excellent and exhaustive treatise on Corporations of Mestres, to which frequent reference will be made in the ensuing pages, is only recommended to the student. There are few questions on the subject to which that work does not afford a solution; and to which it does not supply at least a key.

variety of civil and political rights. One of the peculiar properties of a corporation is the power of *perpetual succession*; for, in judgment of law, it is *capable* of indefinite duration. The rights and privileges of a corporation do not determine or vary, upon the death or change of any of the individual members. They continue as long as the corporation endures." (2 Kent's Com. 267-'8.)

It is sometimes said that a corporation is *immortal*; but its immortality means only a *capacity for perpetual succession* as long as it exists. So far from being, in fact, immortal, most private corporations, created by or in pursuance of statutes, are limited in duration to a few years, although there are still many without limitation, and therefore capable of continuing indefinitely, as long as a succession of individual members can be kept up. (2 Kent's Com. 267-'8.)

It was chiefly for the purpose of clothing bodies of men in succession with the qualities and capacities of one single, artificial being, that corporations were originally invented, and for the same convenient purpose they have been brought largely into use—more largely, and for more varied and important purposes of manufactures, trade, and commerce, within the present century than ever before. By means of corporations, many individuals may act in perpetual succession as one; may transmit their estates with facility to their successors, without the multiplicity of conveyances, which would otherwise be requisite; and may transact business without incurring, at common law, any *personal* responsibility, or exposing to loss any other property than so much as they may severally think fit to put into the common stock of the corporation. In Virginia, there is also a further convenience—namely, that the *shares*, although the property of the corporation, may consist of real estate, are declared (V. C. 1873, c. 57, § 21, 63), to be *personalty*, and therefore capable of being conveyed and transmitted with more facility than if they were real. (1 Bl. Com. 467-'8; 2 Kent's Com. 268.) But so far as relates to the title of the *corporation* to lands, it must be conveyed, as in the case of natural persons.

The common law derives its doctrine, and its distribution, of corporations from the Roman law, with which, however, they did not originate, as Blackstone inadvertently states (1 Bl. Com. 468). They are recognized by the law of the *XII Tables* (Table VII), but that law was confessedly borrowed from the laws of Solon at Athens. Solon seems to have permitted such associations, whether for purposes of mere affection, of business, or of devotion, with the utmost freedom, subject only to the condition that nothing should be done *contrary to the laws of the land*. (Cooper's Justin. Insts. 594; Dig. Lib. 47, Tit. 22, 4; 1 Kent's Com. 525, n.)

The Roman law styled corporations *universities*, as forming one whole out of many individuals, and *collegia*, from many being gathered together into one; names which, in modern times, have been more usually confined to those corporations instituted for the education of youth, and the advancement of learning. In the Roman law, corporations are always *aggregate*—that is, composed of several persons,—never *sole*, consisting of *one only*. Its maxim is “*Tres faciunt collegium*,” although if the number be, by subsequent contingency, reduced to one only, it may still subsist as a corporation, *Si universitas ad unum redit, et stat nomen universitatis*. (1 Bl. Com. 468–’9; 1 Browne’s Civ. & Adm. Law, 141, & seq.; Dig. Lib. L. 16, 85; Id. Lib. III, 4, 7.)

The *powers and the incapacities* of corporations in the Roman law were very similar to those recognized by our own common law, which will be presently exhibited. (1 Bro. Civ. & Adm. L. 145 to 147.)

The will of a corporation, by the Roman law, was determined, as with us, by the voice of the *major part* of the members, notwithstanding Blackstone’s statement, that *two-thirds* were required. (1 Bro. Civ. & Adm. L. 147, & n (16); Dig. Lib. L. 17, 160; Id. Lib. L. 9, 2 & 3.)

The objects for which corporations were created at Rome were very various, and in many instances, at least in the earlier periods, *political*. Numa is said to have resorted to them as a safeguard against the rival factions of the Sabines and Romans, hoping, by subdividing the hostile races into smaller societies of every particular trade and profession, at least to abate the evil. (1 Bl. Com. 468–’9.)

Corporations framed for the advancement of learning in their precise present state and form, seem to be the fruit of modern invention, although the Roman law, at least in its later periods, recognized institutions approximating to our modern colleges. Thus, in the time of the Emperors, the professors in different sciences began to receive regular stipends from the public treasury, and to be subject to regulations ordained by the State. And it is especially interesting to lawyers to know that the most flourishing and celebrated of these seminaries were for the purpose of *teaching the laws*. They were promoted chiefly by the Emperors Constantine, Theodosius, and Justinian, the latter of whom restricted the study of the law to the three schools of Rome, Constantinople, and Berytus (now Beyroot), in Phœnicia. The students in these institutions were subjected to a *five years’ course*, and derived from academic testimonials of proficiency no small privileges and advantages, as the graduates of the English universities now do. (1 Bro. Civ. & Adm. L. 162–’3.)

The Grecian youth, who long before used to attend the

schools of philosophy and rhetoric at Athens and elsewhere, listened to teachers who were not authorized by the State, nor formed into corporate bodies upon a public foundation endowed with legal capacities, subject to regulations of their own, and possessed of funds of maintenance independent of the honorary fees paid by students. The State sometimes so far lent its sanction to the philosopher's teaching as to give him an assigned and fixed seat of instruction, as the Academy to Plato and the Lyceum to Aristotle; but their disciples acquired by their attendance no privileges similar to those of graduation in the English universities, nor was that course of study made by law a necessary preparation to any profession or pursuit. (1 Bro. Civ. & Adm. L. 151, & n (10).)

It was not until after the revival of letters in Europe,—indeed, not until the thirteenth century,—that colleges and universities assumed that form which they have at present, having public authority to teach and to confer academical degrees, which, *in Europe*, carry with them certain established privileges accorded by law. (1 Bro. Civ. & Adm. L. 151, &c., & n (10).)

## 2<sup>b</sup>. The several kinds of Corporations.

To understand the qualities of corporations with discrimination, they must be marshalled into classes according to several grounds of distinction—that is, according to the *number of persons* which compose them; according as the *government is or is not concerned* directly in them; and according to the *object and design* of their organization;

W. C.

### 1<sup>c</sup>. The several kinds of Corporations, according to the *number of Persons* which compose them.

Corporations, according to the number of persons which compose them, are either, (1), Corporations aggregate; or (2), Corporations sole;

W. C.

#### 1<sup>d</sup>. Corporations Aggregate.

A corporation aggregate consists of *many persons* united into one society, who are kept together by a perpetual succession of members, so as to have the capacity to continue for ever. Of this kind are the mayor and commonalty of a city, the president and masters of a college, the shareholders of a bank, of a railroad, of a turnpike, &c. (1 Bl. Com. 469.) A corporation aggregate is usually composed of a number of natural persons, in their natural capacity, but it may consist also of bodies politic and corporate, either wholly or in conjunction with natural persons. Thus, the government of a country, or county, or city, is often a member of a private corporation, as of a banking, railroad, or canal company. Such combinations,

however, are not favored, and in Virginia it is provided by statute (V. C. 1873, c. 56, § 2, 3,) that "one company shall not subscribe to the stock of another unless it be specially allowed by law;" which provision, however, is not to prevent a company from receiving stocks or other property in satisfaction of any judgment, &c., or as collateral security for, or in payment of, a debt, or from purchasing them at a sale made for its benefit; and if it thus acquires shares of its own stock, it may either extinguish them, or transfer them to a purchaser; but whilst it holds them no vote is to be given thereon. (V. C. 1873, c. 56, § 3.) The State, however, may acquire the works of an internal improvement company by forfeiture (V. C. 1873, c. 61, § 55); and counties, cities, and towns may subscribe for the stock of such companies. (Id. § 62 & seq.)

#### 2<sup>d</sup>. Corporations Sole.

A corporation *sole* consists of *one person only*, e. g. king, bishop, parson. In Virginia no instance of a corporation *sole* seems now practically to exist, but it might at any time be created *by statute*.

Before the Revolution of 1776, ministers of the Episcopal Church (then, by law, the *established church* of the colony), when they were *inducted* into their parishes, had a *freehold estate* in the *glebe* attached to the church, and seem to have been *corporations sole*. And some suppose that after the adoption of the Federal Constitution in 1789, the rights of the church to these *glebes*, &c., through the parsons, as sole corporations endued with the capacity of perpetual succession, could no more be impaired than any other *vested right*. (Brunswick v. Dunning, 7 Mass. 447; Weston v. Hunt, 2 Mass. 500; Terrett v. Taylor, 9 Cr. 43.) But the well settled doctrine in Virginia is, that the Revolution swept away the church establishment, and all its appendages; that the acts of 1776, 1784, 1786, and 1788, confirming to the Episcopal Church, as the successor of the legal establishment, the possession of its glebes and other property, were *properly and constitutionally* repealed by the act of 1798, as inconsistent with the Constitution and the principles of religious freedom; and that the act of 1801, appropriating all the property of the Episcopal Church, and the glebes, as fast as they became *vacant*, to the use of the poor, &c., was *not unconstitutional*. (Turpin, &c., v. Lockett, &c., 6 Call. 113; Selden v. Overseers, &c., 11 Leigh, 127; 1 Tuck. Bl. App'x, n (M), p. 104, &c.)

#### 2<sup>c</sup>. The several kinds of Corporations, according as the *Government is or is not concerned therein*.

Corporations, according as the government is or is not concerned therein, are, (1), Public; and (2), Private;



W. C.

1<sup>d</sup>. Public Corporations.

A public corporation is one which has for its object the *municipal government* of a portion of the people (*e. g.*, a city or a county); or which is founded for other *public*, although they be not *political* purposes, and which *belongs wholly to the government*,—such as the University of Virginia, the Board of Education, &c. (Ang. & A. Corp'ns, 9, 27-'8; Bank of U. S. v. Planters Bank, 9 Wheat. 907; Bank of U. S. v. McKenzie, 2 Brock. 393.)

The Legislature, as a trustee for the public, may modify or abolish public corporations at pleasure; but private corporation charters are regarded as *contracts*, the obligation of which the States are prohibited by the United States Constitution (Art. I, § X, 1) *to impair* (2 Kent's 305; Terrett v. Taylor, 9 Cr. 52; Dartmouth Col. v. Woodward, 4 Wheat. 636; Richm. Fred. & Pot. R. R. Co. v. Louisa R. R. Co., 13 How. 71; Jas. Riv. & K. Co. v. Thompson & al, 3 Grat. 270; City of Richmond v. Rich'd & Danv. R. R. Co., 21 Grat. 604, 617); a principle which, however, does not forbid a State, in the exercise of the right of *eminent domain*, from altering or abolishing a charter in *any case*, when the public advantage requires it; but always upon condition of making a *just compensation*, corporate franchises being no more exempt from the exercise of the right of eminent domain than other property. (James Riv. & K. Co. v. Thompson & al, 3 Grat. 270.)

*Municipal* corporate bodies, such as cities and counties (which are sometimes denominated *quasi* corporations), are further distinguished from *private* corporations in having for the most part *no corporate funds* from which a judgment against them can be satisfied, and in the consequent personal liability of the individual corporators for the corporate debts; for cities, towns, counties, &c., being instituted only for political and civil purposes, each member thereof (if, by *statute*, a private action lies against the corporation at all) is liable in his person and private estate to the execution. (Ang. & A. Corp'n, 32; 2 Kent's Com. 274; Russell v. Men of Devon, 2 T. R. 667; Atto. Gen. v. Exeter, 2 Russ. (3 Eng. Ch.) 53.)

2<sup>d</sup>. Private Corporations.

A private corporation is any one *not public*; and in order that it may be *public*, it must not only exist for *governmental* or for *public* purposes *alone*, but the *whole property therein* (if there be any property) must belong to the government in its *political capacity*. (2 Kent's Com. 305-'6; Terrett v. Taylor, 9 Cr. 43, 52; Dartmouth Col. v. Wood-

ward, 4 Wheat. 636; Braeken v. W. & Mary Col. 1 Call, 164.)

Thus, banking, insurance, railroad, canal, bridge companies, &c., are *private corporations*, and that notwithstanding the State may be a principal—nay, the *sole* shareholder therein (Ang. & A. Corp'n; Bank of United States v. Planters Bank, 9 Wheat. 907). And in some instances what is acknowledged to be a public municipal corporation, may stand relatively to the State as a *private corporation*—*e. g.*, where a city exercises a *franchise* of *gas or water works*, &c. (Moodalay v. E. Ind. Co., 1 Bro. C. C. 469; Nabob of Carnatic v. E. Ind. Co., 2 Ves. Jun'r, 59; S. C. 4 Bro. C. C. 198; Scott v. City of Manchester, 2 Hurlst. & N., 204; 1 Am. L. C. 622.)

### 3<sup>c</sup>. The several Kinds of Corporations, according to the Object and Design thereof.

Corporations, according to the *object and design* thereof, are (1), Ecclesiastical; and (2), Lay;  
W. C.

#### 1<sup>d</sup>. Ecclesiastical Corporations.

Ecclesiastical corporations are such as are created for the advancement of religion. They generally consist of *spiritual* (*i. e.*, clerical) persons, and according to Blackstone, of *none others*—*e. g.*, Bishop and Parson, which are instances of *sole corporations*, and Dean and Chapter, which are *aggregate*. (1 Bl. Com. 470; Ang. & A. Corp. 32.)

Ecclesiastical corporations are not wholly unknown in the United States (*e. g.*, in New York, Ohio, &c.), but they do not in this country consist wholly of clerical persons, and cannot be of very familiar occurrence where there is no church by law established. In Virginia they do not exist at all since 1787 (12 Hen. Stats. 266; Va. Const. 1869, Art. V, § 17), unless theological seminaries may be so styled. But churches, cemeteries and parsonages, and needful church furniture, may be *vested in trustees* for the several objects contemplated by them, not to exceed *two acres* in an incorporated town, and *thirty acres* out of it. (V. C. 1873, c. 76, § 8, &c.)

#### 2<sup>d</sup>. Lay Corporations.

Lay corporations are corporations intended for *secular purposes*, or as is sometimes said, not very accurately, composed of *secular and not clerical persons*. They are either *civil* or *eleemosynary*. (1 Bl. Com. 470.)  
W. C.

#### 1<sup>e</sup>. Civil Corporations; W. C.

##### 1<sup>f</sup>. The Nature of a Civil Corporation.

A civil corporation (which may be either *public* or *private*) is one created for *any secular purpose*—*e. g.*,

the King, cities, counties, &c., for *governmental purposes*; for the *advancement of trade, manufactures, &c.*, such as the East India Company, manufacturing companies, banking companies, &c.; for *advancement of learning*, such as universities, colleges, library companies, the Royal Society, &c.; or for purposes of *general improvement*, &c., such as canal, bridge, railroad companies, &c. (1 Bl. Com. 470-'71.)

2<sup>d</sup>. Advantages of Corporations in connection with Business Purposes.

The advantages of a corporation for the transaction of business in comparison with an ordinary partnership, may be summed up under the heads following:

W. C.

- 1<sup>st</sup>. Any number of persons may unite in an enterprise without inconvenience, contracting, suing, and being sued, in the *corporate name*.
- 2<sup>nd</sup>. The Shareholders may dedicate to the undertaking such amount as each thinks fit, and that, at *common law*, is *the limit of his responsibility*.

It must be observed, however, that in several of the States, as in New York and Massachusetts, and in others also, the policy has prevailed for many years of holding to more or less of personal liability, over and above their shares, usually to an amount equal to their shares, those persons who were members of the company at some certain period, in some instances at the period of its *dissolution*, in others, more rationally, at the *date of the engagement* sought to be charged. (Ang. & Ames Corp. 546, & seq.) The act of Congress creating the system of National Banks provides that "the shareholders of each association," organized under the act, "shall be held individually responsible, equally and ratably, and *not one for another*, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." (13 U. S. Statutes, 102, § 12; 2 Bright Dig. 54; Rev. Stats. U. S. 1001, § 5151.)

In Virginia we have adopted this policy in respect to corporations, *created by the circuit courts*, as presently to be mentioned, as to which it is enacted that "for all debts which shall be due and owing by the company, the persons composing the company, *at the time of its dissolution*, shall be individually responsible to the extent of their *respective shares of stock* in said company, and no further." (V. C. 1873, c. 57, § 63.) The effect of this provision is to make the shareholders, at

the time of the dissolution of the company, answerable for its debts and engagements to an extent equal to the amount of their respective shares, *over and above the same*. (Briggs v. Penniman, 8 Cow. (N. Y.) 387, 396; Spear v. Crawford, 14 Wend. (N. Y.) 30; Bank of Poughkeepsie v. Abbotson, 24 Wend. 473, 479; S. C. 5 Hill, 451; Slee v. Bloom, 19 Johns. (N. Y.) 456; Castleman v. Holmes, 4 J. J. Marsh (Ky.) 1; Johnson v. Somerville & Co., 15 Gray (Mass.) 216; Anderson v. Com'th, 18 Grat. 295; Mills v. Stewart, 41 (N. Y.) 384.)

3<sup>s</sup>. Shares in Virginia are *personal property* always, and are susceptible of easy sale and transfer by the holder or *his representative*. (V. C. 1873, c. 57, § 21, 63; Bac. Abr. Corp. (E) 5.)

3<sup>t</sup>. Limited Partnerships.

Limited partnerships are a statutory substitute for some of the advantages of corporations,—namely, the advantage of *limited responsibility*, and of suits in the name of one or a few. They are unknown to the common law, which holds every associate in business, who *shares its gains*, in whatever proportion, liable to the full extent of his entire estate for the obligations contracted. Limited partnerships were introduced into France in 1673, and have found considerable favor in many of these States, and, amongst others, in Virginia. “Limited partnerships,” says the Statute (V. C. 1873, c. 142, § 1, &c.,) “for the transaction of *mercantile, mechanical or manufacturing business within this State*, and not for the purpose of banking, brokerage, or making insurance, may be formed upon the terms and subject to the conditions and liabilities prescribed” in the statute. There must be one or more persons liable as *general partners*, and then there may be one or more *special partners*, who, contributing a *specific sum in cash*, as capital, shall not be personally liable for the debts, except in a few specified cases. Provision is made for making *publicly known* the name of the firm, the sum contributed by *each special partner*, the *nature* of the business, the *place* where it is to be transacted, and the *duration* of the partnership. The general partners alone can conduct the business of the concern, and *suits are to be brought by or against them*. The capital originally contributed by the special partners is *not to be diminished* by the withdrawal of any part thereof, nor by any division of interest or profits, nor is any sale or transfer of, nor lien on the assets legal, for the purpose of giving preference amongst creditors; nor, finally, can there be

- any dissolution of a limited partnership before the time specified in the articles, unless notice thereof be recorded and published, as the formation of the partnership is required to be. See Ang. & A. Corp. 37 & seq.

A later statute (March, 1875), authorizes a limited partnership of a different character, "for the purpose of conducting any lawful business or occupation within this State or elsewhere, whose principal office or place of business shall be established and maintained within this State."

The capital only subscribed by the members of the association, is liable for the debts of the association, which is constituted by the persons belonging to it signing and acknowledging before some officer competent to take acknowledgment of deeds, a statement in writing, setting forth the proper names of such persons; the amount of capital subscribed by each; the total amount of capital, and when and how to be paid; the character of the business to be conducted, and the location of the same; the name of the association, with the word "*limited*" added thereto as a part of the same; the contemplated duration of the association in no case to exceed twenty years; and the names of the officers of the association, selected in conformity with the provisions of the act; and any amendment of such statement is to be made only in like manner; the statement and amendments to be recorded in the deed-book of the county or corporation where the principal office is established. Each partner must in the statement agree to waive the benefit of the homestead exemption as to any debt which he may at any time owe the association. And the statement is required to be published once a week for two weeks in a newspaper, published in the county or city in which is the principal office.

The word "*limited*," it is declared, shall be the last word of the name of every such association; and the omission of it in the use of the name of the partnership, shall render every person who participates in such omission, or acquiesces therein knowingly, liable for any indebtedness or damage thence arising.

Interests in such associations are personal estate, and may be transferred as the by-laws direct. The business is to be conducted by managers elected by the stockholders, but the capital is not to be impaired.

These provisions are taken substantially from the English Statutes of 1862, 25 & 26 Vict. c. 89. (Acts 1874-'5, p. 118, c. 140; Wms. Pars. Prop. 201 & seq.)

2°. Eleemosynary Corporations.

Eleemosynary corporations are constituted for the distribution of the *free gifts* of the founder to such persons as he has directed. Of this kind are hospitals for the poor, sick, and impotent, asylums for orphans, and such incorporated schools as dispense education and maintenance, or either, gratuitously. Hence, the colleges in the two English universities (which originally were merely *endowed boarding houses*, where board was afforded gratuitously), and many similar institutions scattered through Great Britain, are properly eleemosynary foundations, having been established for two purposes.—namely, 1. For the promotion of piety and learning, by proper regulations and ordinances; and, 2. For imparting pecuniary aid to the members of those bodies, to enable them to prosecute a life of devotion and of study *ad orandum et studendum*, with greater ease and assiduity. 1 Bl. Com. 471.)

These collegiate eleemosynary corporations in England may be composed of ecclesiastical persons, principally or wholly, and they may in some things partake of the nature, &c., of ecclesiastical bodies, but they are, notwithstanding, recognized as *lay*, and *not ecclesiastical* corporations, because they are not erected *primarily* for the advancement of religion. (1 Bl. Com. 471; Phillips v. Bury, 1 Ld. Raym. 6.)

Colleges in the United States are in general, like the English universities, *not eleemosynary*, but *civil* corporations; not eleemosynary in respect to the *instructors and officers*, because, although they have stipends assigned them from the funds of the institution, yet these are rewards *pro opere et labore*, not charitable gratuities, every stipend being conditioned on service and duty; nor eleemosynary in respect *to the pupils*, because, whilst the endowment sometimes enables and induces the college to afford board and instruction at reduced rates, they are seldom purely gratuitous. When, however, they, or either of them, are gratuitous, the corporation is to that extent eleemosynary. (1 Bl. Com. 471; Dartmouth Coll. v. Woodward, 4 Wheat. 681.)

### 3°. The Creation and Organization of Corporations; W. C.

#### 1°. The Creation of Corporations; W. C.

#### 1°. Mode of Creating Corporations; W. C.

#### 1°. Mode of Creating Corporations in England.

In England, corporations are created by the King alone, or by the King in conjunction with the Parliament, that is, *by statute*, to which the King's assent is necessary. But the King's consent to the creation of a corporation may be as well *implied* as express. Thus, the



King's consent is implied in the case of those corporations which exist at common law, such as bishops, parsons, church-wardens, and the King himself, all of whom, from time out of memory, have been held to be corporations *virtute officii*. Another method of implication of the King's consent to corporations is *by prescription*, or immemorial usage, as in the case of the City of London, and many others, which have existed as corporations time whereof the memory of man runneth not to the contrary. (1 Bl. Com. 472-'3; *Town of Pawlet v. Clark*, 9 Cr. 292.)

The *proper words* of creation (although by no means indispensable), are *creamus*, *erigimus*, *fundamus*, *incorporamus*, and the like; but so far are these words from being indispensable, that a corporation may be created by mere inference, from the general effect of a royal grant, if such seems to be the *intent*. Thus, a grant to certain persons to have "*gildam mercatoriam*," a mercantile fraternity or company, or *guild*, is sufficient to incorporate them for ever; and so with every other act of the sovereign authority, which treats several persons in a collective capacity as *one body*. (1 Bl. Com. 474; *Bac. Abr. Corp'ns* (B); *Sutton's Hospital*, 10 Co. 29 b, 30 a, 30 b, 28 a; *Tone Conservators v. Ash*, 10 B. & Cr. (21 E. C. L.) 349; 2 Wend. (N. Y.) 109; 2 Johns. C. R. 325; *Stebbins v. Jennings*, 10 Pick. (Mass.) 188.)

The power of erecting corporations may be exercised by the King (and *a fortiori* by Parliament), *through* individuals, upon the maxim *qui facit per alium facit per se*. Thus, the Chancellor of the University of Oxford has power by the charter to erect corporations subservient to the needs of the students, and has often exerted it. (1 Bl. Com. 474.) And so with us, as we shall presently see, the Legislature has thought fit to confer on the *circuit courts and judges* the power to create most classes of corporations. (V. C. 1873, c. 57, § 59, &c.)

## 2°. Mode of Creating Corporations in Virginia.

Corporations with us are created always, either directly by an act of the Legislature, or in pursuance of the authority of one. Formerly, a *special act* was required in each case; but by a series of statutes, commencing March, 1854, provision is made for incorporating joint-stock companies by order of the *circuit courts*, or of the *judges thereof in vacation*, "for the conduct of any enterprise or business which may be lawfully conducted by an individual, or by a body politic or corporate, *except to construct a turnpike beyond the limits of the county, or a railroad or canal, or to establish a bank of circulation*



(V. C. 1873, c. 57, § 59), in which cases the corporation can still be created only by *special act of Assembly*.

The proceedings to obtain an order of incorporation from the circuit court, or the judge in vacation, are described by the statute as follows, viz:

Any five or more persons may make, sign, and acknowledge before any justice of the peace, or notary public, a certificate in writing, setting forth the *name, the purposes, the capital stock and its division into shares, the amount of real estate* proposed to be held, the *place of the principal office*, the *chief business* to be transacted, and the *names and residences of the officers* for the first year of the company. This certificate may be presented to the *circuit court* of the county, city or town in which the principal office is to be located, or to the *judge thereof in vacation*; and thereupon the charter may be granted or refused upon the terms set forth in the certificate, or upon such other terms as may be adjudged reasonable. If the charter be granted, it is to be recorded by the clerk of the court in a book to be kept for the purpose, and certified to the secretary of the Commonwealth, to be in like manner recorded *in his office*. And from the time the charter is lodged in the office of the secretary of the Commonwealth, the persons who signed the certificate, and their successors, and such other persons as may be associated with them, according to the provisions of the charter, are a body politic and corporate, by the name set forth in the certificate, with all the general powers, and subject to all the general restrictions provided by law previous or subsequent. The same *circuit court*, on the motion of the company, or on reasonable notice to the company, may alter or amend the charter; and the alteration or amendment is to be recorded by the clerk of the court and the secretary of the Commonwealth, and from that time shall be as effectual as if originally a part of the charter. (V. C. 1873, c. 57, § 59, & seq.)

The reasons which would influence parties to form a *corporation*, instead of a *partnership*, to conduct any business or enterprise which may be lawfully conducted by an individual, that is, where to be such body politic constitutes the *only franchise* contemplated, are stated, *Ante* p. 505-'6.)

As to the power of *Congress* to create corporations, see *McCulloch v. State Bank of Maryland*, 4 Wheat. 424; *Osborn v. Bank of United States*, 9 Wheat. 738; *Ang. & A. Corp.* 60 & seq.

In respect to the power of the States to create *banking corporations*, see *Briscoe v. Bank of Kentucky*, 11 Pet.

527; *Woodruff v. Trapnall*, 10 How, 205; *Darrington v. Bank of Alabama*, 13 How. 12; *Curran v. Bank of Arkansas*, 15 How. 317. The power seems indubitable, notwithstanding the State may be a shareholder in the bank, or even its exclusive proprietor.

2<sup>d</sup>. The Circumstances which Accompany the Creation of a Corporation.

Sir Edward Coke enumerates the things which are *of the essence* of a corporation thus: 1st, *Lawful authority* of incorporation; 2d, *Persons to be incorporated*, and that in two manners, *scil.* persons natural, or bodies incorporate and political; 3d, *A name* by which they are incorporated; 4th, *A place* whereby to distinguish its locality; and 5th, *Words sufficient in law*, but not restrained to any legal or prescriptive form of words. (*Sutton's Hospital*, 10 Co. 29 b, 30 a, 30 b, 28 a.)

Of these *the first* and *the fifth* have been adequately set forth. Somewhat remains to be said of the other three; W. C.

1<sup>o</sup>. Persons to be Incorporated.

These may be either *natural persons* or *bodies politic*. (1 Bl. Com. 475, n (2); *Sutton's Hospital*, 10 Co. 31 b; Ang. & A. Corp. 74.)

There seems to be no sufficient legal reason why several corporations may not, like several natural persons, form *partnerships between themselves*, or with natural persons, in order to effectuate the purpose of their creation, and thus become mutually liable for the engagements of one another, and that without constituting, in their conjunct relation, one body politic. Thus, where several incorporated transportation companies (*e. g.*, railroad corporations) unite amongst themselves, or with natural persons, to constitute a continuous line, the stipulations connected with "through-tickets" or "through-transportation," &c., are, or may be, binding *upon all*, when made by *any one*, each being the *agent of all*. (*Railroad Co. v. Harris*, 12 Wal. 85; *Wilson v. Ches. & O. R'l'r'd Co.* 21 Grat. 665-'66; *Gr. Wes. R'l'r'd Co. v. Blake*, 7 Hurlst. & Norm. 987.) But see Ang. & A. Corp. 75, 248; *Sharon Can. Co. v. Fulton Bank*, 7 Wend. (N. Y.) 412.

2<sup>o</sup>. The name of a Corporation.

A corporation must have a *name*, which is said to be "*the knot of its combination*," without which it could not perform its functions. (1 Bl. Com. 475; *Sutton's Hospital*, 10 Co. 28 b.) The name, however, may be *implied* as well as express. (*Prest. & Coll. of Phys. &c. v. Salmon*, 1 Ld. Raym. 681; S. C. 1 Salk. 191.)

And the name *must be observed; rigorously in judicial*

*proceedings*, and *substantially* in *grants*, *obligations*, &c. Greater rigor is insisted on in *writs* and *pleadings*, because a mistake committed in them may be corrected with little inconvenience, and generally without loss, and accuracy is desirable if it is to be attained without too great a sacrifice; whilst in *grants* and *obligations*, if the description is held to be insufficient, the benefit is irremediably lost; and, therefore, more latitude is allowed in the latter case. Thus, where *John*, Abbot of Worcester, by the name of *William*, Abbot of W., granted common of pasture to J. S., the grant was held to be good; for, although the *Christian name* was mistaken, there was sufficient certainty in the designation *Abbot of W.* to ascertain who was the grantor intended; but if the name had been thus mistaken in a *writ of pleading*, it had been fatal. (Bac. Abr. Corp. (C) 3; Finch's case, 6 Co. 65 a, 65 b; Mayor, &c. of Lyme Regis, 10 Co. 126 a; Dean, &c. of Norwich Case, 3 Co. 75 a, n (E).)

In *judicial proceedings*, where the corporation is a *party*, a mistake in the name can, at common law, be taken advantage of only by a plea in *abatement*, unless the mistake be so entire that no such corporation exists, in which case the variance is *fatal at the trial*. (Mayor of Stafford v. Bolton, 1 Bos. & P. 43; Doe v. Miller, 1 B. & Ald. (4 E. C. L.) 703.) In Virginia, however, (as in England since 1834), the *misnomer*, at least in the former case, is no ground for even a plea in abatement, but upon *affidavit* that it is the right name, it is inserted, and the case proceeds. (V. C. 1873, c. 167, § 18.)

Where the corporation is *not a party*, and there being occasion to refer to it, the name is *misstated*, the mistake, unless it be a mere error in the *spelling* (the *sound being the same*), is a fatal variance *at the trial*. Thus, *Segrave* for *Seagrave* (being *idem sonans*) is no variance (Williams v. Ogle, 2 Stra. 889); nor *Whyneard* for *Wynyard* (Rex v. Foster, Russ. & Ry. 412); but *Austrialia maria* for *Australia maria*, in describing the *South Sea Company*, was held to be fatal. (Turvil v. Aynsworth, 1 Stra. 787; S. C. 2 Ld. Raym. 1516.)

In *grants* and *contracts*, if there be enough to show clearly what corporation was intended, the description is sufficient, though the words and syllables be varied from; or, as it is sometimes expressed, if the description be erroneous in *sensu et re ipsa*, it is fatal; but if only in *syllabis et verbis*, leaving no reasonable doubt of the *identity*, the variance will not impair the validity of the transaction any more than in the case of a natural person. Thus, if to a corporation founded by the name of *major*

*et burgenses burgi domini regis de Lynne Regis* (mayor and burgesses of the King's borough of Lynne Regis), an obligation be made by the name of *major et burgenses de Lynne Regis* (mayor and burgesses of Lynne Regis), omitting the words "*of the King's borough*," it is sufficiently expressed, for the word *burgesses* is significant of a *borough*, and all boroughs are *King's boroughs*. (Mayor, &c., of Lynne Regis, 10 Co. 125 a.) So a bond payable to the "*President and Managers of the Culpeper Agricultural and Manufacturing Society*" is recoverable by the corporation in its true name of "*The Culpeper Agricultural and Manufacturing Society*," although it is said it would have been otherwise had the bond been made payable to "*The President and Managers of the Culpeper Agricultural and Manufacturing Bank*." (Culpeper Manufacturing Society v. Digges, 6 Rand. 167. See Mayor, &c. of Lynne Regis, 10 Co. 124 b, 124 a, n (B); Pitts v. James, Hob. 124.) If the name be so given as to distinguish it from other corporations, and ascertain its identity, it suffices. (Hagerstown T. P. Co. v. Green, 5 Harr. & Johns. (Md.) 122; Inhabitants, &c. v. Strong, 5 Halst. (N. G.) 323; Berks & Dauphin Co. v. Myers, 6 Serg. & R. (Pa.) 16; 5 Mass. 97, 99; 16 Mass. 141.) Thus, a devise to "*George, Bishop of Norwich*," is good, although the Bishop's name be *John*, and to "*the mayor, jurats, and town council*" of the ancient town of Rye, will pass land to the corporation of "*the mayor, jurats, and commonalty*" of Rye. And so to omit the words "*and company*," in designating the obligee in the official bond of the cashier of a bank, has been held not to vitiate the bond. (Bac. Abr. Corp. (C) 2; Ayray's Case, 11 Co. 21 a.) And devises to "*The city of London*," to "*The University of Oxford*," to "*Trinity College, Cambridge*," although these be not precisely the corporate names of those several bodies politic, yet sufficiently signify the meaning of the devisor, whose wishes are to be more respected than in the case of grants and contracts. (University of Oxford's Case, 10 Co. 576; Counden v. Clarke, Hob. 32 a.)

For a corporation to seek to avoid its own grant or contract, by reason of a *misnomer* of itself, savors of fraud, and is justly reprehended by Lord Coke as a pernicious novelty, which, "*till this generation of late times, was never read in any of our books*." (Sir Moyle Finch's Case, 6 Co. 65 a; Mayor, &c., of Lynne Regis, 10 Co. 125 b.)

A corporation may have one name by which to take, grant, and contract, and another by which to plead and be

impleaded. Thus, it may purchase and contract by the name of "master, wardens and brothers," and be empowered to sue and be sued by the name of "Wardens" alone. (Bac. Abr. Corp. (C) 1; Coll. of Physicians, 2 Salk. 451; S. C. 1 Ld. Raym. 630; Minot v. Curtis, 7 Mass. 441.) Nor does there seem to be any reason why a corporation, like a natural person, may not have several names for all purposes, either because the charter shall so provide, or because it is indiscriminately *called and known* by several designations. (Bac. Abr. Corp. (C) 1, & cases *supra*.)

A corporation, subsequently to its original creation, may receive a new name, or if it exist by prescription, it may be known by divers names at different periods; but it does not, by a change of name, lose its franchises, debts, or estates, all of which remain, and are recoverable by the body, under its new designation. (Bac. Abr. Corp. (C) 1; Luttrell's Case, 4 Co. 876; Mayor of Scarborough v. Butler, 3 Lev. 237; Mayor of Carlisle v. Blamire & al, 8 East. 487; Wilson v. Ches. & O. R. R. Co., 660-'61.)

3°. The Place of a Corporation.

"Without a place," says Lord Coke, (Sutton's Hosp. 10 Co. 29 b), "no incorporation can be made." The principal purpose of the requirement seems to be to *distinguish the corporation* from others, so that, whilst the *place* ought to be so far designated as to show that the corporation was designed to have its being within the limits of the State or country which creates it, it is not needful to assign to it a more particular locality; nor is it requisite that the place stated should be the true place. Thus the "Prior of the Hospital of St. John of Jerusalem, *in England*,"—the "Hospital of St. Lazarus of Jerusalem, *in England*,"—the "Prior of St. Mary of Mt. Carmel, *in England*,"—the "Chaunters of Mt. Calvary without Aldgate, *London*,"—are all good corporations. (Sutton's Hospital, 10 Co. 32 a, 32 b.)

How far a corporate body can actually have "a local habitation," is a question which arises in connection with the imposition of *municipal taxes*; with the capacity to *transact business* in other localities, especially in other States; and with the *right to sue and be sued*, when it depends on residence or citizenship.

W. C.

#### 1°. Place of a Corporation as to Imposition of Taxes.

Taxes may unquestionably be imposed by a county, town, or other local municipal authority, *upon the property*, real or personal, belonging to a corporation, so far as the same lies within its limits, and is not by law ex-

empt; and also upon the individual *resident stockholders* in respect of their shares in the capital stock of the company; but it appears the better opinion that such local taxes cannot be imposed upon the *corporation* in respect to its capital stock, *as if it were a resident* of that locality, nor upon the non-resident stockholders in respect of their shares, unless it be plainly so provided by statute. The corporation is not properly a *resident* anywhere, and a *share* in it, which is for the most part personal property, in the absence of any law to the contrary, follows the person of its owner, and has its *situs* at his domicile. But for purposes of taxation it may be separated from him *by law*, which may direct its taxation to be at the place where the property is actually located; and this principle may apply as well to intangible property, like shares in incorporated companies, as to tangible chattels. (Tappan v. Merchants' Bank, 19 Wal. 499.)

The national bank law has thus provided for the separation of the stock in any of those banks from the person of the owner, by enacting that taxes *under State authority* may be imposed on the shares belonging to the holders, and on the real property belonging to the association *at the place where the bank is located* (that is, *within the State* wherein it is situated), and the legislature of each State may determine the manner and place of taxing all the shares of such banks within its limits; *save* that the taxation shall not be at a greater rate than upon other monied capital, and that the shares of non-residents of the State shall be taxed in the city or town where the bank is located, and not elsewhere. (2 Bright. Dig. 61, § 41; 15 U. S. Stats. 34; Rev. Stats. U. S. p. 1015, § 5219; Tappan v. Merchants' Bank, 19 Wal. 499 & seq.; Nat. Bk. v. Comm'th, 9 Wal. 353.)

And it is not competent even to a State Legislature to impose a tax upon the *corporate franchise* itself, belonging to a corporation, unless the power to do so be reserved in the charter, because the charter of a *private corporation* is a *contract*, and to levy a tax on the *franchise* (in contradistinction to the *property*) of the corporation, would impair the obligation of the contract, which the United States Constitution (Art. I, § X, 1) forbids any State to do. (Ang. & A. Corp. 427; Rex v. St. Luke's Hospital, 2 Burr. 1053; Rex v. St. Bartholomews, 4 Do. 2435; Rex v. Gardner, Cowp. 79; Staffordshire, &c., Canal, 1 T. R. 348-'9; King v. Teignmouth, 12 East. 46; Rex v. Mirfield, 10 East. 219; King v. Hull Dock Co. 5 M. & S. 394; Bank of Watertown v. Assessors, 25 Wend. (N. Y.) 686; Brown v. Prest. Pen.



Bank, 8 Mass. 445; Portland Bk. v. Aythorp, 12 Mass. 252; Prov. Bk. v. Billings, 4 Pet. 514; Dartm. Coll. v. Woodward, 4 Wheat. 518; Worcester v. West. R. R. Co. 4 Metc. (Mass.) 564; Johns v. Comm'th, 7 Dana (Ky.) 342.)

And corporations created by the United States as agencies to accomplish the constitutional purposes of the Federal government are not to be taxed by the States, for if that were allowed the action of the Federal authority might be paralyzed. (*McCulloch v. State of Md.* 4 Wheat. 316; *Osborn v. Bk. of U. States*, 9 Wheat. 738; *Nat. Bk. v. Kentucky*, 9 Wal. 362; *Thompson v. Pacific R. R. Co.* Id. 579.) But the restriction does not extend to a tax on the *real property* of the bank created by the United States, as a financial agent, nor on any interest in such institution which the *citizens* of a State may *individually* possess (Same Cases; *Van Allen v. The Assessors*, 3 Wal. 573; *People v. The Commissioners*, 4 Wal. 244; *Bradley v. The People*, 4 Wal. 459; *Nat. Bank v. The Comm'th*, 9 Wal. 353; *Lionberger v. Rouse*, 9 Wal. 468); and the tax on the shareholders may be collected *of the bank itself*, out of the dividends. (*Nat. Bank v. Kentucky*, 9 Wal. 362-'3.) There is also a marked distinction between a corporation created by the Federal government for national purposes, and corporations deriving their existence, and exercising their franchises, under authority of State laws, but employed by the national government for certain duties and services. As to the latter, while Congress may exempt them from any State taxation which will really prevent or impede such services, yet in the absence of legislation by Congress, to indicate that such exemption is deemed essential to the performance of the governmental services expected from them, it cannot be claimed on the mere ground that the corporation is employed as an agency of the government. And the tax may be either upon the property or business of the corporation; but of course not on any instrumentalities or means of the government in the possession of such corporation. (*Nat. Bk. v. Com'th*, 9 Wal. 353; *Thomson v. Pac. R. R. Co.*, 9 Wal. 579; *West. U. Tel. Co. v. Richmond*, 26 Grat. 30 & seq.)

And so, on the other hand, it is not competent to Congress to impose a tax on any necessary and direct agency of the States, in the administration of their reserved powers, *e. g.* upon the *salaries of judges* (*Collector v. Day*, 1 Wal. 113, 124); although a tax upon banks incorporated by a State, notwithstanding they may be needful agencies of the State governments in respect to



their financial system, is held to be constitutional. (*Veazie Bank v. Fenno*, 8 Wal. 533.) The principle remains, however, and is acknowledged by the Supreme Court of the United States, that it is as important to leave the rightful powers of taxation unimpaired in the States as to maintain the powers of the Federal government in their integrity. (*Osborne v. Mobile*, 16 Wal. 479, 481.)

Where a State government, in creating a corporation, exempts its property from taxation, no tax can be constitutionally imposed, either upon its personal or real property required for the successful prosecution of its business, nor upon its *franchise*, which also is its *property*. But such a restriction upon the State's power of taxation, in general so impolitic, must be clearly and unambiguously set forth, in order to prevail. (U. S. Const. Art. I, § X, 1; *Home, &c. v. Rouse*, 8 Wal. 438; *Wash. Univ. v. Rouse*, Id. 440; *Wilmington R. R. v. Reid*, 13 Wal. 266-'7; *Raleigh & Gaston R. R. Co. v. Reid*, Id. 270; *Antoni v. Wright*, 22 Grat. 833; *Binghampton Bridge*, 3 Wal. 75.)

2<sup>d</sup>. Place of a Corporation, as respects its Capacity to conduct business elsewhere.

A corporation can have no legal actual existence beyond the limits of the sovereignty which created it. Existing only in contemplation, and by force of the law, it can have no absolute and independent being where that law ceases to operate. It must *dwell* in the place of its creation, and *cannot migrate* to another sovereignty. But it does not follow that its existence in its own proper *habitat* may not be recognized in other places. It can do no acts either within or without the State which creates it, except such as are *authorized by its charter*; and those acts must also be done as *the charter directs*. And if the charter, by a just construction of its terms, does not permit the corporation to exercise its powers beyond the limits of the State, all contracts made and acts done in other States are *ultra vires* and void. But if there be in the charter no restriction of locality in the exercise of its faculties, its *residence* in one State no more hinders its contracting in another than it would in the case of a natural person. The only questions are, whether the act or contract be within the *legitimate scope of the corporate functions* of the body politic; and that being resolved affirmatively, whether, secondly, the act, &c., is permitted by the *policy of the law of that country where it takes place*. It is doubtless competent to the State to prohibit any foreign corporation to make contracts or to transact busi-

ness within its limits, but such rigor would be seldom warranted by prudence, and would be wholly opposed to the usual comity which is observed between the countries of the world. By virtue of that comity, every country is presumed to sanction all transactions of foreign persons, natural or artificial, which occur within it, and which it does not expressly and *plainly prohibit*; which is, indeed, no more than recognizing the laws of another sovereignty, as in general civilized countries always do. And if this principle prevail, as it does, between countries wholly independent of one another, it cannot be less true as between these States, which are united by so many and such intimate ties of business and political association. (Bank of Augusta v. Earl, 13 Pet. 519, 555, &c.; Tombigbee R. R. Co. v. Kneeland, 4 How. 16; Lafayette Ins. Co. v. French, 18 How. 405; St. Louis v. Ferry Co. 11 Wall. 429; Bank of Marietta v. Pindall, 2 Rand. 465; Taylor v. Bank of Alexandria, 5 Leigh, 475; Silver Lake Bank v. North, 4 Johns. C. R. 372.)

The acquisition of lands by foreign corporations, like other transactions, is regulated by this principle. And in Virginia it is believed that there is no other restriction than that which applies to domestic corporations as well, namely: that "No incorporated company shall hold any more real estate than is *proper for the purposes for which it is incorporated*, nor employ its capital, money, or effects, or otherwise engage in transactions or business not proper for those purposes. One company shall not subscribe to the stock of another, unless it be specially allowed by law." (V. C. 1873, c. 56, § 2, 3; Banks v. Poiteaux, 3 Rand. 136.)

Since the local sphere within which a corporation may exercise its functions, and the functions themselves, depend on the terms of the charter, that must always be consulted in order to determine the question of where it may act and what it may do. Thus, if a college be established in a designated town, it has not the power to institute another seminary elsewhere as a branch of itself. (People v. Trustees of Geneva College, 5 Wend. (N. Y.) 211.) And as it is in the discretion of every State to allow or prohibit foreign corporations to operate within its jurisdiction, so it may prescribe such conditions as it shall think fit, one of which may be, and sometimes is, that the corporation shall consent *to be sued there*, which consent, indeed, is to be presumed from its *doing business there*. (Lafayette Ins. Co. v. French, 18 How. 405; Balt. & O. R. R. Co. v. Harris, 12 Wall. 81; Liverpool Ins. Co. v. Mass. 10 Wall. 576.)

It should be observed that a corporation, although it may have a *quasi habitat* or residence, yet *cannot be a citizen*, and therefore cannot claim the benefit of that clause of the United States Constitution (Art. IV, § ii), which declares that “The *citizens of each State* shall be entitled to all privileges and immunities of *citizens* in the several States.” (Bank of Augusta v. Earle, 13 Pet. 586 ; Paul v. Virginia, 8 Wal. 177, 179 ; Ducat v. Chicago, 10 Wal. 415.)

Two or more States may concur in creating corporations having the same name, composed of the same members, clothed with the same identical capacities and powers, and intended to accomplish one and the same object—*e. g.*, the Chesapeake and Ohio Railroad Company, which is chartered by the States of Virginia and West Virginia ; but they are, notwithstanding, *distinct corporations*, neither having any existence outside of the State which created it, although each may exercise its faculties and corporate powers within all the States concerned, by consent of the government of those States respectively. (Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286 ; Insur Co. v. Francis, 11 Wall. 216 ; Railroad Co. v. Harris, 12 Wall. 65 ; Railway Co. v. Whitton, 13 Wal. 283-’4 ; Balt. & O. R. R. Co. v. Gallaher, 12 Grat. 658. But see Phila. Wil. & Balt. Railroad Co. v. Maryland, 10 How. 392.)

3<sup>d</sup>. Place of Corporations, as respects their Capacity to Sue and be Sued when it depends on *Residence or Citizenship*.

For purposes connected with the jurisdiction of the Federal courts (which have cognizance of controversies “*between citizens of different States*,” &c. U. S. Const. Art. III, § ii, 1), a corporation, although properly *not a citizen at all*, yet is deemed a citizen of the *State which created it*, and no averment or proof of the citizenship of *its members* elsewhere to repel the jurisdiction, will avail (Louisville, C. & C. R. R. Co. v. Letson, 2 How. 497 ; Marshall v. Balt. & O. R. R. Co. 16 How. 329 ; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black. 297 ; Railway Co. v. Whitton, 13 Wal. 583) ; although prior to 1844 it had been persistently held that, in order to entitle a corporation to sue or be sued in the Federal courts, under the provision in question, *every corporator* must be a citizen of some State other than that of which the other party was a citizen. (Strawbridge v. Curtis, 3 Cr. 267 ; Bank of U. S. v. Deveaux, 5 Cr. 84 ; Bank of Vicksburg v. Slocumb, 14 Pet. 60.)

In a State court, if jurisdiction depends *on residence*,

it is presumed that, in the absence of a statutory rule, the corporation would be considered *to reside* in that county or city wherein is its principal office, or wherein its operations are conducted; or if its operations are not limited, and there is no principal office, then in any county or city in the State. (Ang. & A. Corp. 82, n 1; 1 Hawks. (N. C.) 422); But in Virginia we have a statutory rule (V. C. 1873, c. 165, § 1, (cl. 2), § 2,) which directs that a corporation may be sued in any county or city wherein is its principal office, or wherein its principal officer, or his substitute, &c., *resides*, or wherein the cause of action, or part of it, arose.

## 2<sup>c</sup>. The Organization of Corporations.

In order to unfold the doctrine touching the organization of corporations, we are to advert to, (1), The acceptance of the charter by the corporators; (2), Proof of acceptance of the charter; (3), Attributes or incidents of a corporation at common law; (4), Admission and election of members and officers; (5), Disfranchisement of members, and amotion of officers; and (6), Subscription for and assessment upon shares in joint-stock companies; W. C.

### 1<sup>d</sup>. The Acceptance of the Charter by the Corporators.

A majority *in interest* of a duly constituted meeting of the corporators must accept formally, or by implication, the provisions of the charter, which is in the *nature of a contract*. At least there must be such consent signified in the case of *private corporations*, and *perhaps*, also, it may be required in the case of *towns*. (Ang. & A. Corp. 67-'8; Rex v. V. Chan. Cambridge, 3 Burr. 361; King v. Passmore, 3 T. R. 40; Rex v. Askew, 4 Burr. 2199; Dartm. Coll. v. Woodward, 4 Wheat. 518; Grays v. T. Pike Co. 4 Rand. 578; Riddle v. Locks, &c. of Mass. 169, 184; Ellis v. Marshall, 2 Mass. 269, 276, 277.)

### 2<sup>d</sup>. Proof of Acceptance of Charter.

If the particular charter were *applied for*, its acceptance is presumed. And so if the charter itself declares the corporation to be a *corporate body*. (Ang. & A. Corp. 69.) Hence, in charters granted by the *Circuit Court*, upon application, the applicants constitute a corporation as soon as the certified copy is delivered to the Secretary of State, and is lodged in the office of the Secretary of the Commonwealth. (V. C. 1873, c. 57, § 60.)

Where certain acts preliminary to organization are required,—*e. g.*, notice of the meeting of corporators for the purpose, &c.—these acts must be proved (Grays v. T. Pike Co. 4 Rand. 579; Owing v. Speed, 4 Wheat. 420 n); but they may be proved presumptively as well as by direct

evidence, as by showing that at the first meeting officers were duly elected, and that thenceforward for twenty years the proceedings of the corporation had been regularly conducted. (*Middlesex Husbandmen v. Davis*, 3 Metc. (Mass.) 133.)

In general, the proof of acceptance of an *original charter* should be by the corporate records, and if they exist, by *them alone*; but it seems not absolutely indispensable to produce the records. The acceptance may be shown by the corporation having *acted under the charter*. (*Grays v. T. Pike Co.* 4 Rand. 580; *Crump v. U. S. Mining Co.* 7 Grat. 352; *Russell v. McLellan*, 14 Peck. 63; *Middlesex Husbandmen v. Davis*, 3 Metc. 133; *U. S. Bank v. Dandridge & als*, 12 Wheat. 64, 71; *Rex v. Hughes*, 7 B. & Cr. (14 E. C. L.) 708.)

In case of an *amended charter*, the acceptance may be shown by any acts of recognition by the corporators lawfully assembled, or by their lawful agent for that purpose; *e g.*, the *directors*, &c. (*Dartm. Coll. v. Woodward*, 4 Wheat. 688.) And so necessary is the acceptance of an amended or modified charter, that even under the power reserved to repeal, alter or modify the charter of a private corporation, whilst the Legislature may *repeal* the charter at its pleasure, it cannot modify it without the consent of the corporation; although, if it refuses to consent, it must cease its operations as a corporate body. (*Yeaton v. Bank of Old Dominion*, 21 Grat. 598-'9.)

Acceptance of an original charter cannot be *partial*, nor for a *limited time*, nor *conditional*; but as to an amended charter, *it is said* to be otherwise. (*Rex v. Passmore*, 3 T. R. 240; *Rex v. Amery*, 1 T. R. 589; *Rex v. Cambridge* 3 Burr. 1656; *Rex v. Basey*, 4 M. & S. 255.)

Individual corporators are bound, in the acceptance of a charter, original or amended, by the act of the majority, where there is *no fraud*. (*Currie v. Mut. Ins. Co.* 1 H. & M. 315.)

### 3<sup>d</sup>. Attributes or Incidents of a Corporation at common law.

These attributes are tacitly, and by implication, annexed to every corporation as soon as created, without any express grant, although they may be more or less circumscribed by the charter itself, or by the general law. At present it will suffice merely to *name them*; they will be discussed more at large in speaking of the *powers of corporations*. (1 Bl. Com. 475-'6; Ang. & A. Corp. 83; V. C. 1873, c. 56, § 1; *Post*, p. 534-'68.)

W. C.

#### 1<sup>o</sup>. To have Perpetual Succession.

Not that all corporations *actually have* perpetual suc-

cession, but all possess the *capacity to have it*, if the authority which creates them shall think fit to bestow it. (1 Bl. Com. 475.)

- 2<sup>e</sup>. To have a Common Seal, and change the same at pleasure.

The common seal authenticates the expression of the aggregate corporate will, and was for many ages deemed the *only mode* of doing so. This doctrine, however, is much broken in upon in England, and in the United States is wholly discarded, corporations being allowed to express the corporate will, not only by the *common seal*, but also by a *vote of a majority of the corporators* at a lawful meeting, and entered upon their corporate records; by a *vote of a majority of directors*, entered on the directors' minutes; by *agents* duly appointed; and by *accepting the benefit* of the contract, or otherwise ratifying it. (1 Bl. Com. 475, & n (5); V. C. 1873, c. 56, § 1; Dunn v. Rector, 14 Johns. 118; Bank of Columbia v. Patterson, 7 Cr. 305; Legrand v. Sidney, 5 Munf. 324; Fleckner v. U. S. Bank, 8 Wheat. 338; Burr v. McDonald, 3 Grat. 215; Eureka Co. v. Bailey Co., 11 Wal. 491; Andover, &c., T. Pike Corp'n v. Gould, 6 Mass. 40.)

- 3<sup>e</sup>. Power to Contract and be Contracted with.

The only restriction is that the subject of the contract shall not be beyond the scope of the purpose for which the corporation was created, and shall not be prohibited either by the charter or by general law. (1 Bl. Com. 475, 484; Bac. Abr. Corp. (C) 23; Ang. & A. Corp. 209, &c., 205, &c., 233, &c., 257, &c.)

- 4<sup>e</sup>. Power to Take, Hold, Transmit in Succession, and to Alienate Property, and to do all similar acts just as a natural person may.

But by the statutes of *mortmain* in England, it is provided, that if any corporation purchase *lands* without a *license from the Crown*, they shall be forfeited. And in Virginia it is enacted that no corporation shall hold any more *lands* than are allowed by charter, or if the charter be silent, than are required by the *objects of the corporation*; but it is not said what shall be the consequence of violating the prohibition. It is presumed, however, that the lands are *forfeited to the Commonwealth*. (1 Bl. Com. 475, & n (4); V. C. 1873, c. 56, § 2, 3; 2 Insts. Com. & Stat. Law, p. 585, c. xviii.) But see Banks v. Poiteaux, 3 Rand. 141; 1 Lom. Dig. 13, 4.

- 5<sup>e</sup>. Power to make By-laws for the government of the Corporation.

They must be consistent with the laws of the land, and



of course *conformable to the charter*. (1 Bl. Com. 475; V. C. 1873, c. 56, § 1.)

6°. Power to Sue, and to be Sued.

A corporation may sue for every possible cause of action or suit which *it can have*, and in like manner may be sued for every one which *can exist against it*. (1 Bl. Com. 475; Stor. Confl. L. § 565.)

7°. Power to Remove Members and Officers.

This power is limited in respect to removal of members, to those corporations whose membership supposes *no property interests* to be concerned. (2 Kent's Com. 224; Ang. & A. Corp. 83.)

4<sup>a</sup>. Admission and Election of Members and Officers; W. C.

1°. Admission of Members.

The mode of admitting members is generally determined by the charter. If that be silent, a distinction is to be noted between corporations for *business purposes* on one side, and other corporations, religious, scientific, political, or social, on the other. In the former, no *vote of admission* is generally needful. Every one who owns stock, whether by original subscription, or by conveyance or transfer, is entitled to the rights of membership; but the transfer must be attested by the book of the company in which the transfers are recorded. In the latter class of corporations, in the absence of any directions in the charter, members are admitted by *vote of the company*, taken like any other vote. (Ang & A. Corp. 88-'9.)

2°. Election of Officers.

The mode of electing officers is as the charter prescribes, (*e. g.*, by a vote of the corporation in lawful meeting assembled, by the board of directors, or by a select committee); or if the charter is silent, then by a *vote of the company* taken like any other vote; or the corporation may, *by a by-law*, devolve the election of officers, or any of them, upon a select body, if not inconsistent with the charter. (Ang. & A. Corp. 90, &c.)

No one, in general, can be elected to a corporate office *in reversion*, and it is therefore essential that there shall be a *vacancy*. Hence, where an officer is illegally removed, and another elected in his place, upon the restoration of the former by writ of *mandamus*, the latter's election is *ipso facto* vacated. (King v. Mayor of Colchester, 2 T. R. 280; Colt v. Bishop of Coventry, Hob. 150; The King v. Smith, 2 M. & S. 407; Burr's Ex'ors v. McDonald, 3 Grat. 215.)

If a day be appointed by the charter for the election of officers, or a certain hour of the day, the election may



notwithstanding be validly made *after that day*, or after that hour, at a reasonable time, the designation of the time being merely *directory*. Nor need the person elected be then present, if near enough to enter upon the duties of the office. (Foot v. Mayor of Truro, 1 Stra. 625; S. C. 2 Stra. 697; Rex v. Poole, 7 Mod. 195; Rex v. Courtenay, 9 East. 261; Atto. Gen. v. Scott, 1 Ves. Sen. 415; People v. Runkle, 9 Johns. 147; King v. Mayor, &c., of Norwich, 1 B. & Ad. (20 E. C. L.) 310.)

If the charter prescribes no form or mode of election, every candidate must be proposed and elected *singly*, and not all by one vote; for in the latter method, each elector, in order to get in some particular person, may compromise his opinion as to the others, and thus persons may be introduced who are not the choice of a majority. (Rex v. Monday, Cowp. 539.) But see Queen v. Brightwell, 10 Ad. & L. (37 E. C. L.) 171.)

When the meeting to elect officers is properly constituted, whoever has a majority of all *the votes cast*, whether it be a majority of *those present or not*, is elected, supposing there be nothing in the charter to the contrary. If the members neglect to vote, it is their own default, and does not invalidate the act of the others. And so it is, although those who do not vote protest against an election at that time altogether. So also, if a majority of the electors bestow their votes upon one whom *they know* to be unqualified, the votes given after they are made acquainted with the disqualification are *thrown away*, and the minority who vote for a qualified person will elect their man. (Rex v. Foxcroft, 2 Burr. 1020-'21; S. C. 1 W. Bl. 229; Claridge v. Evelyn & als, 5 B. & Ald. (7 E. C. L.) 81, 86; King v. Parry, 14 East. 561; King v. Hawkins, 10 East. 211; King v. Bridge, 1 M. & S. 76.)

To vote *by proxy* is not a right generally existing at common law, as incident to *all corporations*. It may perhaps belong of right to *shareholders* in joint stock companies; but in corporations where no property attaches to members, and in all cases where a *personal trust* is to be exercised, it exists only where given by the charter, or *possibly* by a by-law of the company. (2 Kent's Com. 294 n; Atto. Gen'l v. Scott, 1 Ves. Sen'r, 417; Phillips v. Wickham, 1 Pai. (N. Y.) 590.)

The person to vote upon shares is generally the party named on the *company's books* as the shareholder. Hence, it is said the mere *tenant for years* of the shares cannot have the privilege; and hence, too, *trustees* who are charged with the *management of the subject*, possess it; as does the *pledger* of stock, in case of the hypothecation,

until it is actually transferred to the pledgee. (Ang. & A. Corp. 97, & seq.)

To choose *too many* persons as officers vitiates the whole election; whilst an election of *too few* is good as far as it goes, and requires only to be supplemented as to the additional persons. (Ang. & A. Corp. 100, 101.)

The reception of illegal votes does not necessarily avoid an election, but it must appear that to exclude the illegal votes would have produced a different result (*Exp. Murphy*, 7 Cow. (N. Y.) 153; *In re Chenango Mut. Ins. Co.* 19 Wend. (N. Y.) 635.) On the other hand, where votes are *erroneously rejected*, the only remedy is to set the election aside, not to regard them as received, and given to the contestant. (Ang. & A. Corp. 103.)

Where the charter pronounces an irregular election *void*, no formality or proceeding is required to annul it; but in the absence of such a provision in the charter, an irregular election is *not void*, but voidable only, remaining in force until it is annulled by *judicial sentence*. Hence, where a majority of the votes are given to an ineligible candidate, of whose disqualification, however, no *express notice* is given to the voters, a party having the minority of the votes is not duly elected, but if declared so, and he accepts the office, he can only be removed by *judicial proceedings*. (Ang. & A. Corp. 102-'3.)

Any *de facto* officer of a corporation, claiming to have authority, and allowed for a long time to act as such, must be presumed rightfully in office, without further proof, and his acts are, in general, binding upon the body accordingly. (Bk. of U. States v. Dandridge, 12 Wheat. 79; Burr v. McDonald, 3 Grat. 215.)

There seems to be no *legal reason* forbidding the inspector of a corporate election to be voted for at it, his office, it is said, being purely *ministerial*, and *not judicial*; yet it is surely undesirable, on *moral grounds*, that one appointed to secure a fair expression of opinion, and to certify it, should himself be one of the parties interested. (Ang. & A. Corp. 105-'6.)

Officers elected for a certain term hold over, it seems by the common law, until their successors are chosen and qualified, independently of any provision to that effect in the charter, although such provisions are generally inserted. (2 Kent's Com. 238.)

#### 5<sup>d</sup>. Disfranchisement of Members, and Amotion of Officers; W. C.

##### 1<sup>o</sup>. Disfranchisement of Members.

In case of corporations owning property *divided into shares*, no shareholder is liable *to be expelled* for any cause

whatsoever, unless it be specially so provided in the charter; but as by purchase of stock he becomes a member, so by transferring it he ceases to be such, without the concurrence of the corporation in either case, save to record the transfer of the shares. (Davis v. Bk. of England, 2 Bingham (9 E. C. L.) 393; Ang. & A. Corp. 405, & seq.)

But in case of corporations of a different character—*e. g.*, municipal, religious, benevolent, scientific, &c., where there is no specific share of property vested in each corporator, disfranchisement may take place as incident to the very nature of the corporation, and as being the consequence of a breach of the conditions tacitly annexed to every such franchise, for every infamous offence of which the corporator shall be *convicted in due course of law*, and for every act *contrary to his duty* as a corporator. (Rex v. Richardson, 1 Burr. 538-'9; *Ld. Bruce's case*, 2 Stra. 819; *Com'th v. St. Pat. Soc.*, 2 Binn. (Pa. 448, 441; Rex v. Andover, 3 Salk. 229; Rex v. London, 2 Lev. 201; Rex v. Guildford, 1 Lev. 162; Rex v. Rogers, 2 *Ld. Raym.* 777; *Comm'th v. Guardians of Poor*, 6 Serg. & R. (Pa.) 469.)

It is a dictate of natural justice that *no one shall be condemned unheard*, "not founded in book-learning," as a great jurist has observed, "but engraved upon the heart." (*Ld. Camden in Shipley's case*, 5 Campb. Lives of Chan'rs, 289; Acts xxv. 16; John vii. 51); and hence, no proceeding to expel a member can be had until he has been *duly notified to appear*. He is not disfranchised *ipso facto*, upon the occurrence of a delinquency, but must be regularly convicted thereof, after having a reasonable opportunity to defend himself. (*Baggs' case*, 11 Co. 99 a; Rex v. Richardson, 1 Burr. 540; Rex v. Liverpool, 2 Burr. 731; *Innes v. Wylie*, 1 Carr. & Kirw. (47 E. C. L.) 257; Rex v. Lynne Regis, 1 Dougl. 174; Rex v. Faversham, 8 T. R. 256; *Harman v. Tappenden*, 1 East. 562; *Com'th v. Penn. Ben. Instit.*, 2 Serg. & R. 141.) This principle is much insisted upon, and never relaxed where rights are in question. Summary as are the proceedings against an attorney at law charged with impropriety of conduct, yet before a judgment disbarring him can be rendered, he should have, says the Supreme court of the United States, "*notice of the grounds of the complaint against him, and ample opportunity of explanation and defence*." This is a rule of *natural justice*, and should be equally followed when proceedings are taken to deprive him of his right to *practise his profession*, as when they are taken to reach his real or personal property. And

such has been the general, if not the uniform practice of the courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open court, on the part of the attorney, as to justify very summary proceedings for his suspension or removal from office; but even then he *should be heard before he is condemned*. The principle that there must be a citation before hearing, and hearing, or opportunity of being *heard before judgment*, is essential to the security of all private rights. Without its observance, *no one would be safe from oppression*, wherever power may be lodged." (*Exp. Robinson*, 20 Wal. 512; *Bradley v. Fisher*, 13 Wal. 354; *Exp. Bradley*, 7 Wal. 375; *Exp. Garland*, 4 Wal. 378.)

## 2°. Amotion of Officers of Corporations.

The power to amove officers, unless restrained by the charter, is, from the necessity of the case, as much incident to a corporation as the power of making by-laws. (*Ld. Bruce's case*, 2 Stra. 819; *Rex v. Richardson*, 1 Burr. 539; *Rex v. Lynne Regis*, 1 Dougl. 149.) If the officer be a *ministerial one*, holding *during pleasure*, he may, in general, be removed without notice or trial, and is, in fact, removed by the appointment of a successor. But if he holds *during good behavior*, or for a *fixed term*, he can only be removed after summons, and after having had license and opportunity to answer for himself. (*Warren's case*, 3 Cro. (Jac.) 540; *Middleton's case*, 3 Dy. 332 b n (28); *Rex v. Thame*, 1 Stra. 115; *Ld. Bruce's case*, 2 Stra. 819; *Rex v. Richardson*, 1 Burr. 539; *King v. Lynne Regis*, 1 Dougl. 149. See *Burr v. McDonald*, 3 Grat. 106.)

The causes for which an officer *may be removed* are stated in the cases just cited, and *Ang. & A. Corp*, 415. See also *Regina v. Truebody*, 2 Ld. Raym. 1275; *King v. Lynne Regis*, 1 Dougl. 158; *King v. Mayor, &c. of Portsmouth*, 3 B. & Cr. (10 E. C. L.) 152; *Regina v. Bailiffs of Ipswich*, 2 Ld. Raym. 1233, 1237; *Rex v. Mayor, &c. York*, Id. 1566; *Rex v. Chalke*, 1 Ld. Raym. 226; *Rex v. Corp'n Wells*, 4 Burr. 2000; *R. v. Mayor of Andover*, 3 Salk. 229; *Rex v. Taylor*, 3 Salk. 231.)

The causes for which he *may not be removed* are illustrated in *Symmer's case*, Cowp. 502; *King v. Williams*, 2 M. & S. 144; *Rex v. Mayor, &c., Leicester*, 4 Burr. 2087, 2003; *Rex v. Chalke*, 1 Ld. Raym. 226; *Reg. v. Mayor &c. Ipswich*, 2 Do. 1238; *Rex v. Taylor*, 3 Salk. 231.)

As to the resignation of a corporate officer, which may be either *express or implied*, see *Ang. & A. Corp*. 424, &c.

## 6<sup>d</sup>. Subscription for, and Assessment upon, Shares in Joint Stock Companies.



And in case of charters granted by the circuit courts, the company *stands incorporated* as soon as the copy certified by the circuit court clerk is *lodged with the Secretary* of the Commonwealth to be recorded. (V. C. 1873, c. 57, § 60.)

The subscription being a *contract*, it cannot be cancelled without the consent of the other party or parties thereto, unless it be provided in the charter. (Ang. & A. Corp. 477-'8.) And where at the time of the subscription there is not only no company organized, but *no charter*, it seems that the corporation subsequently created can have no privity with the subscribers, and can maintain no action on such subscription, for *want of mutuality*. (But see Griffin v. Macaulay, 7 Grat. 476.) The suit should be on the part of the individual subscribers, to whom expressly or impliedly the promise was in law made. And as the subscription alone, without mutuality, does not create a binding obligation, so also, if the charter prescribe, or if a general statute prescribe, (as in Virginia we have seen that it does,) certain payments to be made at the time of subscribing, such payment is a condition precedent, and indispensable in order to make the subscription valid, and so in case of any other condition precedent. (Thames Tunnel Co. v. Sheldon, 6 B. & Cr. (13 E. C. L.) 341; Ang. & A. Corp. 478 & seq.)

It follows, also, from the subscription being a *contract*, that a fraud practised by the *other party* thereto, or at his instance, in order to obtain it, renders it *voidable* by the subscribers. (Centre & K. T. Pike Co. v. McConeby, 16 Serg. & R. 142.)

There seems to be no reason that the personal representative of a subscriber should not be bound on his contract of subscription as well as on any other contract; and the case of Weald of Kent Can. Co. v. Robinson, 5 Taunt. 801, sometimes vouched to prove the contrary, is misconceived. Nor can there be any reasonable doubt that the original subscriber is, at common law, liable for all the instalments agreeably to his contract, notwithstanding he may have assigned his stock before the call is made, or the instalment otherwise becomes due, unless the company accept the assignee *in lieu* of the subscriber; and the case sometimes cited to the contrary (Huddersfield Can. Co. v. Buckley, 7 T. R. 36) was decided upon the special provisions of the charter. At all events, in Virginia, by statute, the assignee and assignor are each liable for any instalment already accrued, or thereafter to accrue; and that even though the company consent to the transfer, although the company might doubtless, by an unambiguous manifestation of an intent to exonerate the original subscriber,



discharge him so far as the company itself is concerned, but not to the prejudice of its creditors. (V. C. 1873, c. 57, § 26, 29.)

A stockholder who has given a stock-note to the corporation for the purchase-money of the stock, cannot, upon the insolvency of the company, transfer his stock, even with the consent of the directors, to an irresponsible person, and so, by substituting that person's note for his own, evade his liability. That would be virtually to withdraw so much of the capital of the corporation, and so to prejudice either the creditors, who to that extent must go unpaid, or his fellow-members in like predicament with himself, who, having given stock-notes, will then have to pay a larger proportion thereof. (Nathan v. Whitlock, 9 Pal. (N. Y.) 152.)

Any *radical* or even any *material change* in the charter, *seriously prejudicial* to the shareholder's interest, and *without his consent*, absolves him from all liability to pay subsequent assessments. (Ang. & A. Corp. 483, &c.; Hartford & N. H. R. R. Co. v. Croswell, 5 Hill (N. Y.), 383; Middlesex T. Pike Co. v. Swan, 10 Mass. 384; Same v. Walker, Id. 390. But see London & B. R. Co. v. Wilson, 6 Bingh. N. C. (37 E. C. L.) 135.)

Where a corporation is empowered to increase its capital stock, each shareholder, in the absence of any provision in the act allowing the increase, is entitled to his proper proportion of the benefit thence arising, either by increasing proportionably the number of his shares, or by enjoying the profit arising from their sale at a premium, and if denied this right by the corporation or its officers, he may maintain a special action of *assumpsit* against the corporation for the loss he may thereby sustain. (Gray v. Portland Bank, 3 Mass. 364.)

It seems to be the prevailing doctrine that where the subscription is for a given number of shares, and it is by statute allowed to the company to sell the shares if the subscriber is delinquent (the statute giving no personal remedy against him, nor he himself expressly promising to pay the same), no action lies to recover assessments or instalments from time to time duly demanded, nor is there any other remedy than the statutory one of *selling the shares*. In order to warrant a personal demand, and action, in such cases, it is said there must be an engagement to pay *all legal assessments upon the shares*. (Andover T. P. Co. v. Gould, 6 Mass. 40; Same v. Hay, 7 Mass. 102; N. Bedford T. P. Co. v. Adams, 8 Mass. 138; Franklin Glass Co. v. White, 54 Mass. 286; Ripley v. Samson, 10 Pick. 371-'2.) This, however, is not in accordance with



the ordinary analogies of the law. The allowance of a special remedy in the absence of negative words not usually dispensing with the common law remedial processes. Accordingly, in many of the States the remedy by a sale of the shares is merely *cumulative*, and does not impair the common remedy by action against the subscriber's person. (Berne v. Cahawba, &c., R. R. Co., 3 Ala. (N. S.) 660; Highland T. P. Co. v. McKean, 11 Johns. 89; Herkimer M. & H. Co. v. Small, 21 Wend. 273; Troy T. P. & R. R. Co. v. McChesney, Id. 296; Grat v. Redd, 4 Monroe (Ky.), 103; Instone v. Bridge Co., 2 Bibb. 577; Tar Riv. Nav. Co. v. Neal, 3 Hawks. (N. C.) 520.) In Virginia all doubt is removed by statute, which declares that if the money due on the shares subscribed be not paid by the stockholder, as required by the president and directors, it may be recovered with interest, by *warrant, action, or motion*, or the shares may be sold, after notice in a newspaper for one month, at public auction, for ready money; and if there be no sale for want of bidders, or the sale shall not produce enough to pay the charges and the money which ought to be paid, with interest, the company may recover the residue, with interest, by *warrant, action or motion*. (V. C. 1873, c. 57, § 23, 25; Grays v. T. Pike Co., 4 Rand. 683-'4.)

#### 4<sup>b</sup>. The Powers and Modes of Action of Corporations.

We are to contemplate, under this head, (1), The modes of action of corporations; (2), The powers of corporations; and (3), The disabilities of corporations;  
W. C.

##### 1<sup>c</sup>. The Modes of Action of Corporations.

The *action of corporations* universally takes place in, or in pursuance of orders of *corporate meetings*; in respect to which it is a rule that they must be (1), held at the proper *place*, (2), at the proper *time*, (3), after proper *notice*, and (4), must consist of proper *persons*, governing their action by proper *rules*;  
W. C.

##### 1<sup>d</sup>. The Time of Meeting.

In order to guard against surprise, the meetings are required to be held either at times appointed by the charter or by-laws, or at times of which the several corporations shall be duly notified. (Rex v. May, 5 Burr. 2682; Rex v. Hill, 4 B & Cr. (10 E. C. L.) 426; Rex v. Liverpool, 2 Burr. 731 & seq; Rex v. Doncaster, Id. 744.)

In Virginia we have some statutory directions which must be noticed. We have already seen how the subscribers are to be notified of the first meeting for *organization*. The *annual meeting* is to be held on the day prescribed by law, or if none be prescribed, on the day ap-

pointed from time to time, by the stockholders, in general meeting; and a general meeting may be held at any time upon the call of the board of directors, or of stockholders holding together *one-tenth* of the capital stock, upon their giving notice of the *time and place* of such meeting for *thirty days* in a newspaper published in or near the place where the last annual meeting was held. (V. C. 1873, c. 57, § 8 to 11.)

2<sup>d</sup>. The Place of Meeting.

The place of meeting is either such as is appointed by law or by the charter, or such (being reasonable and proper) as shall be made known to the corporators a reasonable time beforehand. (Ang. & A Corp.; Rex v. May, 5 Burr. 2682.)

In Virginia we have statutes regulating the *place* as well as the *time*, for the meetings of joint-stock companies.

The place of the meeting *for organization* has been previously noticed. The place for the *annual meeting* is fixed from time to time by the directors, and notice *published for two weeks* in a newspaper. The provisions for a place for *any general meeting* have been described under the foregoing head. (V. C. 1873, c. 57, § 8, 9, 10.)

3<sup>d</sup>. The Notice of the Meeting.

Where times and places are appointed for the meetings by law or by charter, or by by-law or usage, every member is presumed to know them, and no special notice is requisite. But if the business to be done is such as is not ordinarily transacted at such meetings, notice that it is to be brought up is necessary,—*e. g.* the election or motion of an officer, or the enactment of a by-law, &c.; and in the absence of such notice, the transaction of business of that kind is illegal, unless *all the corporators are present*, and *all assent*. (Rex v. Liverpool, 2 Burr. 731, &c.; Rex v. Doncaster, Id. 744; King v. Theodorick, 8 East. 545; King v. Gaborian, 11 East. 77; Rex v. May, 5 Burr. 2682; King v. Faversham, 8 T. R. 356; King v. Langhorn, 4 Ad. & El. (31 E. C. L.) 538; Burr v. McDonald, 3 Grat. 315.)

The summons must proceed from some one who has authority to assemble the corporators, and must be served *personally* upon every resident member, or if non-resident, upon an agent, or must be left at his dwelling, save in those cases where a service through the newspapers is *expressly allowed*. (King v. Gaborian, 11 East. 86, n; King v. Hill, 4 B. & Cr. (10 E. C. L.) 441; V. C. 1873, c. 57, § 8, 9, 10.)

4<sup>d</sup>. The Persons who should compose the Meeting, and the Rules which should govern their Action.

The persons to compose the meeting are, of course, the corporators and their proxies; and the proportion of mem-

bers which shall constitute a *lawful meeting* (which is styled a *quorum*), and also the proportion of those present on any occasion, which shall *determine the will* of the body, may be, and generally are, ascertained by the charter, or by a general law. Thus, in Virginia, by Statute (V. C. 1873, c. 57, § 11), the *quorum* of any joint-stock company, other than a bank of circulation, is a *majority of all the votes* that can be given by all the stockholders, and of a *bank of circulation*, any number of a lawful meeting *that may be present*. The statute does not direct by what proportion of the votes present the will of the meeting shall be determined. The rule of the common law, which is applicable wherever the charter and the statutes are silent, is that, where the corporation consists of a *definite number* of persons (such as railroad and turnpike companies, banks, &c.), there must be present persons who can give a *majority of all the votes* which could be given by all the members; and a majority of the votes given in such a meeting determines the action of the corporation. And where the corporation is composed of an *indefinite number* of persons (such as cities, towns, &c.), any portion of the body, however small, if it be *duly assembled*, forms a *quorum*, or legal corporate meeting, and a majority of the votes given in such meeting prevails. (Bac. Abr. Corporat. (E) 7.)

Where a corporation consists of several distinct parts (often called *integral parts*), there must be present at a corporate assembly a proper *quorum*, according to the foregoing principles, of each integral part (King v. Bellringer, 4 T. R. 822, & seq.; King v. Devonshire, 1 B. & Cr. (8 E. C. L.) 609; King v. Morris, 4 East. 26; King v. Thornton, 4 East. 294); and upon like principles, if an act is required to be done by the *mayor and aldermen*, or by the *president and directors*, the *mayor*, in the one case, and the *president*, in the other, is an indispensable part of the meeting, and all that is done *in his absence* is void. (King v. Buller & al, 8 East. 389; King v. Williams, 2 M. & S. 141; 7 Cow. 526.)

In reckoning the votes, it is most natural and just to allow one vote to each share, thus giving to each stockholder a weight of influence proportioned to his interest, a principle not admissible in *political societies*, for several reasons, and amongst others, because those societies have other interests to protect and cherish besides those of *property*, and because, moreover, the single vote of the property holder generally controls other votes besides, thus indirectly enduing him with a weight in some degree corresponding with his property-interests. But it has not been usual in Virginia to allow one vote to each share, although in an

increasing number of charters, including all granted by the circuit courts, it is so provided. (V. C. 1873, c. 57, § 62.) In all cases, however, where it is not otherwise provided, the vote is *scaled* (as it is called) as follows: Each stockholder gives one vote for each share *not exceeding ten*, and one vote for every *four shares* exceeding ten. And it should be added, that when a vote is offered at any meeting upon stock transferred within sixty days before the same, if any one present object to the vote it shall not be counted, unless the stockholder makes oath that the stock on which he offers to vote is held *bona fide*, and not by a transfer made with intent to multiply votes illegally. (V. C. 1873, c. 57, § 12, 13.)

The books and minutes of a corporation are usually satisfactory, but *not conclusive* evidence of what they contain; and so documents to which the corporate seal is attached are, upon proof of the seal, for the most part sufficiently authenticated, but the seal is *not conclusive*. (Grays v. T. Pike Co. 4 Rand. 578, 581-'2.)

The recording officer of a corporation may certify copies of its records, and his certificate is evidence of the verity of such copies, but *not of facts* connected with the corporation. (Oakes v. Hill, 14 Pick. 442.)

## 2<sup>c</sup>. The Powers of Corporations.

The powers of corporations, as well at common law as in Virginia, may be satisfactorily exhibited under the heads following, viz:

1. The Power of having Perpetual Succession;
2. The Power of having a Common Seal, and Changing it at pleasure;
3. The Power of Contracting and being Contracted with;
4. The Power of Taking, Holding, Transmitting and Alienating Property, and otherwise acting in such matters, like a Natural Person;
5. The Power of Suing and being Sued; and
6. The Power of Making By-Laws, not contrary to the laws of the land: to which Chan'r Kent proposes to add,
7. The Power to Remove Members and Officers.

These powers, even at common law, are tacitly incident to every corporation, so far as they are not restrained by the charter, although no mention of them be made. (1 Bl. Com. 475; (V. C. 1873, c. 56, § 1; Sutton's Hospital, 10 Co. 30 b; Norris v. Staps, Hob. 211 a); W. C.

### 1<sup>d</sup>. Power to have Perpetual Succession.

Although every corporation possesses the *capacity* to have perpetual succession conferred upon it, it is, in fact, gene-

rally limited in its duration, either by the charter or by general law. Thus, in Virginia, *mining and manufacturing* companies are limited to a period of *thirty years*, and cease to exist at any time upon four-fifths of the stock falling into the hands of less than five persons, or upon more than one-half remaining for more than six months the property of one person. (V. C. 1873, c. 57, § 38, 36.) And there is, moreover, reserved to the Legislature the power to alter, amend or repeal the charter of a *mining or manufacturing* company after fifteen years, or the charter of any other than an *internal improvement company* after the same period, and of an internal improvement company, or of any company chartered by the circuit court, &c., at pleasure. (V. C. 1873, c. 57, § 38, 64; Id. c. 56, § 1.)

See further as to the power of the State over *internal improvement companies*, (V. C. 1873, c. 61, § 55 to 61.)

And let it be remembered, that whilst the charter of every *private corporation* is a contract, and so, in pursuance of Art. I, § x, 1, of the United States Constitution, cannot be altered or otherwise impaired without the consent of the corporators (in the absence of any authority reserved in the charter so to do), yet that does not prevent a State, in the exercise of its *right of eminent domain*, from abolishing the corporation, or appropriating its franchise, like any other property of individuals, when necessary for the public advantage, upon providing a *just compensation* to the corporation. (Terrett v. Taylor, 9 Cr. 52; Dartmouth Coll. v. Woodward, 4 Wheat. 518, 526; James Riv. & K. Co. v. Thompson, 3 Grat. 270.)

A question has been made by an eminent jurist (1 Tuck. Com. 162, B. I), as to the character of a *fee-simple estate* in lands granted to a corporate body whose duration is limited to a few years; but there seems to be no difficulty in apprehending that the fee-simple passes, according to law, to the assigns of the corporation at its dissolution. The estate remains, although the artificial person who first enjoyed it has ceased to exist. (2 Bl. Com. 108; V. C. 1873, c. 112, § 8.)

2<sup>d</sup>. Power to have a Common Seal, and to change the same at pleasure.

Blackstone states that a corporation can bind itself no otherwise than *under its corporate seal*, and that doctrine is fully sustained by the case of Taylor v. Dulwich Hospital, 1 P. Wms. 655; but it has been much qualified of late years in England (London Dock Co. v. Sinnot, 8 El. & Bl. (92 E. C. L.) 351; Nicholson v. Bradfield Union, 1 Q. B. (Law Reps.) 620, 622, and cases there cited and marshalled), and in the United States, has been quite super-

seded. The American doctrine is, that a corporation may bind itself—

1. Under its corporate seal;
2. By vote of a majority of the corporators, entered in the corporation records, at a lawful meeting;
3. By vote of the directors duly taken, and entered in their minutes—or *perhaps* not written;
4. By agents duly appointed, whose authority may be proved by any satisfactory or competent evidence; or,
5. By accepting, knowingly, the benefit of the contract, or otherwise ratifying it.

See *Legrand v. H. S. College*, 5 Munf. 324; *The Banks v. Poiteaux*, 3 Rand. 143; 2 Kent's Com. 290-'91, & n (b); *B'k of Columbia v. Patterson*, 7 Cr. 305; *Dunn v. Rector, &c.*, 14 Johns. 118; *Fleckner v. B'k of U. S. 8 Wheat.* 338; *Eureka Co. v. Bailey Co.* 11 Wal. 491; *Burr v. McDonald, &c.*, 3 Grat. 215; *Bac. Abr. Corp.* (D).

At common law, the seal of a corporation, like that of an individual, can be nothing else than an *impression on wax, wafer, or some other tenacious material*, and not directly on the paper or parchment. (*Ang. & A. Corp.* 186; 2 Hill (N. Y.) 228-'9; 3 Hill, 494-'5.) It need not, however, be its own seal, for sealing is *cera sigillo impressa*; and, as is remarked in Sheppard's Touchstone, if the party seal with a stick, or any such like thing, which doth make a print, it is good. And although it be a corporation that doth make the deed, yet they may seal with any other seal besides their common seal, and the deed never the worse. (*Shep. Touchst.* 57; *Perk. Sect.* 134; *Mill Dam Foundry v. Hovey*, 21 Pick. (Mass.) 428.) See also *Eureka Co. v. Bailey Co.*, 11 Wal. 491.)

In Virginia, it is enacted (V. C. 1873, c. 15, § 9, cl. 12), that in cases where the seal of *any court or public office* shall be required to be affixed to any paper, the word "*seal*" shall include the impression of the official seal made upon the *paper alone*, as well as one made by means of a wafer, or of wax affixed thereto; and it is quite usual for even *private corporations* to assume that this relaxation applies to them. Such a construction seems hardly warranted, and it is believed that instruments thus executed cannot be deemed *sealed instruments*. There is yet another statute (V. C. 1873, c. 140, § 2), which declares that "any writing to which the *person* making it shall *affix a scroll by way of seal*, shall be of the same force as if it were actually sealed." And this, if it stood alone, might tend to justify the assumption that a corporation (which is a *person*, V. C. 1873, c. 15, § 9, cl. 18), may employ such a scroll as a seal; but in the statute first cited is a provision that "in any



case in which the seal of any *natural person* shall be required to a paper, it shall be sufficient for *such person* to affix to such paper a scroll by way of seal" (V. C. 1873, c. 15, § 9, cl. 10), whence it is inferred that the word *person*, in the enactment under consideration (V. C. 1873, c. 140, § 2), does not include artificial persons, and consequently that a corporation can use no other than the *common law seal*, or impression upon wax, &c.

The seal is to be affixed as the charter prescribes, or if the charter be silent, by the person whom the by-laws or the resolution of the proper authorities shall designate. (Ang. & A. Corp. 190; Hill v. Manchester, &c. Water-Works, 5 B. & Ad. (27 E. C. L.) 866; Burr v. McDonald, 3 Grat. 255.) Hence, whilst the corporation seal affixed to a document by the officer having the legal custody of it is *prima facie* to be presumed to have been rightly affixed (Clarke v. Imp'l Gaslight Co., 4 B. & Ad. (24 E. C. L.) 315), yet if it be proved not to have been done by proper authority, or that it was to be delivered only on *conditions*, &c., which did not exist, it will have no validity as a sealed instrument. (Ang. & A. Corp. 193-'4.)

An agent can only execute a *sealed instrument* for a natural person in that person's presence, or by virtue of a *sealed authority*; but in the case of a *corporation aggregate*, it is of necessity sufficient to authorize the agent to affix the corporate seal *by vote*; for as the seal could only be put to the power of attorney by vote, it may as well be put *by vote* to the contract itself. (Burr v. McDonald & als, 3 Grat. 235; Ang. & A. Corp.) 193.)

For the formal mode of executing the deed of a corporation, see Ang. & A. Corp. 194 & seq; Grayd. Forms, 103; Woodmass v. Mason, 1 Esp. 53; Moises v. Thornton, 8 T. R. 303.

Lastly, upon this topic, the agent who executes the deed of a corporation, in its name, is "*the party executing the deed*," who is to acknowledge the same within the *statutes of registry*. (Ang. & A. Corp. 195; V. C. 1873, c. 117, § 2, 3.)

### 3<sup>d</sup>. Power to Contract, and be Contracted with.

A corporation possesses inherently the power, whether named in the charter or not, to make any *lawful* contract not forbidden by the charter, which is necessary, either directly or incidentally, to enable it to accomplish the purposes for which it was created. (Ang. & A. Corp. 233.) Upon such contracts no personal liability attaches at common law to the individual corporators,—a particular wherein there is a marked diversity between corporations and *general* partnerships; wherein our law accords with that of



Rome. (1 Bl. Com. 484 ; Edmunds v. Brown & al, 1 Lev. 237 ; Dig. Lib. III, Tit. 4, § 7.)

Let us note then, (1), The modes in which a corporation may contract ; (2), With whom and in what manner a corporation may contract ; (3), What contracts a corporation may make ; and (4), The appointment of an agent by a corporation.

W. C.

#### 1<sup>c</sup>. The Modes in which a Corporation may Contract.

It may contract, so as to bind itself, not only under the corporate seal, but in the United States in *four other modes*, as described, *Ante* p. 536.

The members of a corporation aggregate, being many, are constrained to make their contracts either by agents or by vote ; and they cannot give their consent *separately and individually*, so as to oblige the body, but must do it in general meeting, *lawfully assembled*. (1 Bl. Com. 475 ; Soc. of Pract. Knowl. v. Abbott, 2 Beav. Ch. R. (17 Eng. Ch.) 559 ; Ang. & A. Corp. 204-'5.)

#### 2<sup>c</sup>. With whom, and in what Manner, a Corporation may Contract.

A corporation may well contract with one of its own members ; and if several corporations consist of *the same persons*, they may yet validly contract as between themselves. (Ang. & A. Corp. 205-'6.)

The *name* by which a corporation contracts ought to be its true name, of which, however, enough has already been said. (Bac. Abr. Corp. (C) 2, 3 ; Culpeper Man'g Soc. v. Digges, 6 Rand. 167 ; Mayor, &c. of Lynne Regis, 10 Co. 126 a ; Moyle Finch's case, 6 Co. 65 a & b.)

*Mutuality, valuable consideration*, and all the other elements necessary to the legality of the contracts of natural persons, are in like manner necessary in the contracts of corporations. (Ang. & A. Corp. 231-'2.)

#### 3<sup>c</sup>. What Contracts a Corporation may make.

In general it may make any contract not prohibited by its charter, and necessary, directly or incidentally, to enable it to accomplish its corporate purposes. And may bind itself to perform such contracts *at any place*. (Ang. & A. Corp. 233-'4, 255.)

A corporation limited in its transactions to a certain *locality* cannot make a valid contract beyond the limits assigned. (Korn v. Mut. Ass. Soc. 6 Cr. 199 ; Ang. & A. Corp. 236-'7.)

A *municipal* corporation cannot divest itself, by contract, of the power of legislation conferred *for the public weal*, by the charter, although the city may be liable in damages for the breach of its agreement. (Gozzler v.

Corp. Georgetown, 6 Wheat. 593; Presb. Ch. v. N. York City, 5 Cow. (N. Y.) 538; Coates v. Mayor of N. Y. 7 Cow. 604; City of Richmond v. Richmond & D. R. R. 21 Grat. 607 & seq.)

Restrictions upon a corporation, in respect to the making of contracts within the scope of its general purposes, are not favored. (The Banks v. Poiteaux, 3 Rand. 141 & seq.)

Although legislative acts divesting a corporation of any rights with which it is clothed by charter, such as a right to make certain designated contracts, a right to be exempt from taxation, &c., are void under the United States Constitution, as impairing the obligation of contracts (Home of Friendless v. Rouse, &c. 8 Wall. 430, 438, 439, and cases cited 438, n\*), yet except to that extent they are like natural persons, liable to be restrained by statutes from making certain contracts which before were not illegal. And in general, whatever is forbidden, in the way of contract, to natural persons, it is safe to assume is forbidden to corporations as well. (Rex v. Gardner, Cowp. 84, &c.; Ang. & A. Corp. 239-'40.)

Thus, usury is as much forbidden to be practised by a corporation as by a natural person; but in Virginia, by special statutory provision (V. C. 1873, c. 57, § 39; Id. c. 56, § 36), usury is declared to be not available as a defence, to any "*incorporation*," which includes towns as well as incorporated companies. And this provision repels the defence of usury by a corporation, even as to contracts made *before the date of the statute*. (Danville v. Pace, 25 Grat. 1.) The language of the statute is, "*No incorporation shall hereafter interpose the defence of usury in any action; nor shall any bond, note, debt, or contract of such corporation be set aside, impaired or adjudged invalid by reason of any thing contained in the law prohibiting usury.*" It was no violent interpretation to regard this language as applicable to existing contracts, but it may be permitted to doubt whether the Supreme court of the United States would not deem such a statute within the policy and intent of the constitutional prohibition of laws impairing the obligation of contracts.

And so, also, a corporation may be as much entitled to *salvage* for saving vessels, &c., in distress, as natural persons. (The Island City, 1 Black. 129; The Camanche, 8 Wal. 474, &c.) And so, when the law prohibits the issue of bills as *currency* by any but authorized banks, a *municipal* and every other corporation is included in the prohibition, and the holder of such bills cannot recover upon them. (Thomas v. City of Richmond, 12 Wal. 349.) On the

other hand, an effect is allowed, in some instances, to contracts of corporations, apparent from considerations of a general convenience, and from usage, which does not belong to the contracts of natural persons. Thus, *coupon bonds* of corporations, payable *to bearer*, are now, by unquestioned usage throughout the United States, recognized as *negotiable*—that is, as transferable merely by *delivery*, and so transferable as to vest in the transferee a *legal title*; and so likewise are the *coupons* attached to such bonds, as well after they are separated from the bonds, and in the hands of a different holder, as whilst they continue united therewith. (*White v. Vermont & Mass. R. Co.* 21 How. 577; *Comm'rs v. Aspinwall*, Id. 546; *Gelpcke v. Dubuque*, 1 Wal. 206; *Mercer Co. v. Hackett*, Id. 95; *Thompson v. Lee Co.* 3 Wal. 331-'2; *Aurora City v. West*, 7 Wal. 105.)

It is the policy of Virginia (and of many other of these States) to prohibit any company other than a banking company of its own incorporation, from circulating within its limits, *as currency*, any note, bill, or other paper or thing, or otherwise carrying on business as a *bank of circulation*. All contracts connected with such dealings are declared to be void, and the capital of such companies is forfeited to the Commonwealth. (V. C. 1873, c. 60; *Wilson v. Spencer*, 1 Rand. 76.) Hence, as we have seen, if a *municipal corporation*, having no such *banking power*, issue bills *as currency*, there can be no recovery upon them (*Thomas v. City of Richmond*, 12 Wal. 349); and so, also, if a foreign *bank of circulation* lends its bills *in Virginia*, and take a note or other security therefor, the contract of loan and the security are voidable under this statute; but if the bills be lent to a *citizen of Virginia* beyond the limits of the Commonwealth, and where the transaction is not illegal, the contract is not within the prohibition of the statute, and is unimpeachable. (*Bk. of Marietta v. Pindall*, 2 Rand. 474; *Rees v. Conococheague Bk.*, 5 Rand. 329; *Hamtramck v. Selden & als*, 12 Grat. 30, 31.) And where the original contract (such as a loan) is legal, any transaction incidental thereto (such as a mortgage or deed of trust), although made in a State whose laws would have forbidden the primary contract to be made within its limits, is also legal. Thus, a Pennsylvania bank having, at *its own banking house*, lent its own bills to a citizen of New York, which it afterwards secured by a mortgage on the debtor's lands in New York, the courts of the latter State enforced the mortgage. (*Silver Lake Bk. v. North*, 4 Johns. C. R. 370.)

Whilst in general a corporation, where the charter is silent, may make any contract which may be proper for the purpose for which it was created, and *none other* (V. C. 1873, c. 56, § 2; Broughton & als v. Manchester, &c., Water Works Co., 3 B. & Ald. (5 E. C. L.) 1; Meyer v. City of Muskatine, 1 Wal. 391), yet there are some transactions which, by charter or by general statute, are specially prohibited to corporations, as in Virginia, to subscribe to the stock of another company, or otherwise acquire it, except as specially allowed by law, or as *security for, or in payment of*, a debt (V. C. 1873, c. 56, § 2, 3); And in case of corporations created by the *circuit court*, to make a lien, to *prefer one or more creditors* to others (except to secure a debt contracted or money borrowed at the date of the lien), it being declared that all such liens of preference, except as above, shall enure to the benefit ratably *of all the existing creditors*. (V. C. 1873, c. 56, § 63.) This statute seems to have been suggested by the case of Burr's Ex'ors v. McDonald & als, 3 Grat. 215, which allowed such a preference; and of course it is to be construed with reference to the bankrupt law, whose policy it tends to support.

A corporation, as we have seen, must *dwell* in the place of its creation, and cannot *migrate* to another sovereignty; but it may, by its agents, enter into any contract abroad, which *its own charter and the local law* may permit. And it is assumed that the local law permits every transaction which it does not expressly or impliedly forbid. Thus, the Bank of Augusta, located at Augusta, Georgia, by its agent, having purchased a bill of exchange in Mobile, Alabama, for \$6,000, drawn in favor of and endorsed by one Earle, and the bill being protested for non-payment, instituted suit thereon against Earle; and it was held by the Supreme Court of the United States, that as the charter of the bank permitted the transaction, and as nothing appeared in the laws of Alabama adverse to it, it was legal and valid, and that the bank should recover. (Bank of Augusta v. Earle, 13 Pet. 585. See, also, Tombigbee R. R. Co. v. Kneeland, 4 How. 16; Lafayette Ins. Co. v. French, 18 How. 405; St. Louis v. Ferry Co., 11 Wal. 429.)

#### 4<sup>o</sup>. Appointment of an Agent by a Corporation.

It is plain that a corporation aggregate can contract and act no otherwise (at least as to the preliminary negotiations) than by the intervention of agents, either specially designated by the charter, or appointed by the corporation, in pursuance thereof.

The power to appoint agents, like every other power,

abides with the body of corporators, unless the charter or some general statute otherwise directs. And upon the maxim *delegatus non potest delegare*, the directors or other agents cannot appoint sub-agents, unless the power be expressly conferred by the charter, by general statute, or by the corporators in general meeting. (Ang. & A. Corp. 257-5; Lyon v. Jerome, 26 Wend. (N. Y.) 455; Tippetts v. Walker, 4 Mass. 595; Emerson v. Prov. Hat Man'g Co., 12 Mass. 237; Dana v. Bank of U. S., 5 W. & Serg. (Pa.) 247; 6 Gill & J. (Md.) 363; Burrill v. Nahant Bank, 2 Met. (Mass.) 166-7; King v. Mayor of Gravesend, 2 B. & Cr. (9 E. C. L.) 602.)

Generally speaking, any persons may be appointed agents, including infants, married women, and members of the corporation. The charter may designate certain persons to be *exclusively* the agents of the corporation for certain purposes; and thus, although those persons may be appointed by the corporators, they derive their authority not *by delegation*, but *from the charter*, and in such matters are the *sole representatives* of the corporation, whose acts are paramount in authority even to the body at large. Thus, when the directors of a banking company are by the charter charged in this manner with the exclusive management of the institution, the courts will not, at the instance of a majority of the shareholders, interfere with their *honest discretion*, even though it be injudiciously exercised—as, for example, in the division of the profits. (B'k of U. S. v. Dandridge, 12 Wheat. 113; Com'th v. St. Mary's Church, 6 Serg. & R. 508; Dana v. B'k of U. States, 5 Watts & S. 247; Ang. & A. Corp. 259-'60.)

On the other hand, no agent can bind the corporation when he *exceeds his commission*. Thus, the president and cashier cannot generally make contracts discharging the debtors of the bank, nor altering their liability, such functions usually belonging to the *directors alone* (B'k of U. S. v. Dunn, 6 Pet. 59; B'k of Metropolis v. Jones, 8 Pet. 16); nor can the directors, as a general thing, obtain or accept a modification of the charter, or assign the effects, and wind up the concerns of the corporation, or increase the capital stock, or make any other organic change, without the assent of the shareholders. (Stevens & al v. Davison, 18 Grat. 819; Railway Co. v. Allerton, 18 Wal. 233.)

It should be observed, that in the case of the public bonds of counties, cities, &c., the *bona fide* holders thereof for value are bound to look no further than to the statute-law under which the bonds are issued. If there are any

restrictions, limitations and conditions prescribed in the act, such *bona fide* holder has a right to assume that they have been complied with; and if it appears that the public agents have disregarded those conditions, it will not do away with the obligation of the bonds unless the holder was *aware of it*, in which case he is not a *bona fide* holder. (Commissioners of Knox County v. Aspinwall, 21 How. 545; Mercer Co. v. Hackett, 1 Wal. 93; Meyer v. City of Muscatine, 1 Wal. 393; Turquand v. Royal Brit. B'k, 5 El. & Bl. (85 E. C. L.) 259; S. C. 6 El. & Bl. (88 E. C. L.) 331.)

In respect to the *mode of constituting agents* of corporations, the common law, as understood in England, requires that it should for the most part be *by deed, under the common seal*; but even in England the rigor of that doctrine is much abated, and in the United States the doctrine is discarded. The corporation may in this country express its assent to the appointment of agents, not only under the corporate seal, but by a *vote of the corporation* in lawful meeting assembled, and entered upon the corporate records; by a *vote of the directors*, entered on their minutes; by the corporate authorities having *recognized similar previous acts* of the supposed agent; or by a *subsequent recognition* of the agent's authority, either by an *express ratification*, or impliedly, by *taking the benefit* of the agent's doings. (B'k of Columbia v. Patterson, 7 Cr. 305; Fleckner v. B'k U. S., 8 Wheat. 357; Osborne, &c. v. B'k of U. S., 9 Wheat. 738; Dunn v. Rector, &c., 14 Johns. 118; Legrand v. H. Sidney Col., 5 Munf. 324; Burr v. McDonald, 3 Grat. 235-'6.)

The authority to *make a deed* even, may be conferred by a corporation on its agent by *vote of the corporators*, notwithstanding the general rule applicable to *natural persons* requires that authority to execute a *sealed instrument* shall be *under seal*; for corporations are incapable of any *personal act*, and must, in the first instance, direct and assent *by vote*, which may as well authorize the seal to be affixed to the instrument itself, as to the power directing and allowing it to be executed. (Burr v. McDonald, 3 Grat. 235-'6.) But let it be observed that the seal to be employed is always to purport to be the *seal of the corporate body*—that is, the seal adopted by it,—and not the seal of the agent. (Ang. & A. Corp. 286-'7; Jackson v. Walsh, 3 Johns. 225; Clark v. Benton Man'g Co., 15 Wend. 256; Randall v. Van Vechten, 19 Johns. 65; B'k of Columbia v. Patterson, 7 Cr. 304; Dubois v. Del. & Hud. Can. Co., 4 Wend. 285.)

The proof of an appointment of an agent is usually the



records of the corporation, produced from their proper custodian, who is commonly the secretary; and where the corporation is the adverse party, if notice be given to produce its records, and they are not produced accordingly, extrinsic testimony may be brought forward to show their contents, or to show that the agent *acted publicly*, as such, or that the corporation knowingly enjoyed the benefit of the transaction, or otherwise ratified it, &c. (B'k of U. States v. Dandridge, 12 Wheat. 83; Dunn v. Rector, &c. 14 Johns. 118; Ang. & A. Corp. 267 & seq.)

When agents or officers of corporations are required to give bond with sureties, it is generally *directory* only, so that, unless the charter or some general statute otherwise provide, the agent or officer is competent to act, although he has given no bond, and the corporation is responsible for his conduct. (Bank of U. S. v. Dandridge, 12 Wheat. 64; U. States v. Van Zandt, 21 Wheat. 184; Peppin v. Cooper, 2 B. & Ald. (4 E. C. L.) 436-'7.)

Officers of corporations ought of course to be elected as the charter, or the general law, prescribes, or else the election is voidable; but still, if one comes in under *color of right*, he is a *de facto* officer, and his acts and contracts as such will bind the corporation though he be *in fact ineligible*, or although there were at the time no vacancy, there being in fact no officer *de jure* in place. Nay, although never elected at all, yet if the corporation suffer him to act publicly as such, so that he *acquires the reputation* of being the officer he assumes to be, his acts as such are obligatory upon the body. (O'Brian v. Knivan, 3 Cro. (Jac.) 552; Harris v. Jays, 2 Cro. (Eliz.) 699; Baird v. Bank of Washington, 11 Serg. & R. 411; King v. Bedford Level, 6 East. 368; Parker v. Kett, 1 Ld. Raym. 600; Burr v. McDonald, 3 Grat. 235, &c.; U. S. B'k. v. Dandridge, 12 Wheat. 70; Minor v. Mechanics Bank, 1 Pet. 46, 70.)

The *duration of an agency* or of an office depends on the terms of the appointment, or of the charter, for the most part; and an *agency* is as much liable to be revoked as in the case of a natural person, save as in case of a natural person, where the power is *coupled with an interest*, or was given for a *valuable consideration*. (2 Kent's Com. 644; 1 Pars. Cont. 61-'2; Hunt v. Rousmanier, 8 Wheat. 201; Clayton v. Fawcett's adm'r, 2 Leigh, 23; Huston v. Cantrel, 11 Leigh, 173; Bac. Abr. Authority (E); *Ante* p. 223-'4, &c.)

The *mode of contracting* by officers and agents must conform to the charter, or to the commission, and if they are silent, must pursue the methods used by agents generally,



which has already been explained in the chapter of *Master and Servant*. (*Ante* p. 210 & seq. See *Head v. Prov. Ins. Co.* 2 Cr. 166, &c.; *Ducarry v. Gills*, 4 Car. & P. (19 E. C. L.) 121; *N. E. Mar. Ins. Co. v. D'Wolf*, 8 Pick. 56; *Mech. Bk. v. Bk. of Columbia*, 5 Wheat. 326; *Bk. of N. Lib. v. Cresson*, 12 Serg. & R. 260; *Fleckner v. Bank of U. S.* 8 Wheat. 338.)

The *time within which* certain acts shall be done by officers and agents is sometimes prescribed, but it is *merely directory* in general, and the act may, for the most part, be validly done *after the time named*. (*Atto-Gen. v. Scott*, 1 Ves. Sen'r, 415.)

The ordinary proof of the agent's doings varies according as the agent is a *constituted board*, or is composed of *one or more individuals*. In the former case a minute is commonly made and recorded of what they do; and that is the best evidence of their action, if such a minute was made; but if not, their action, and in all cases the action of individual agents, must be proved by the most satisfactory evidence that presents itself, as in the other affairs of life (*U. S. Bk. v. Dandridge*, 12 Wheat. 75; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Russell v. McLellan*, 14 Pick. 63; *U. S. v. Van Zandt*, 11 Wheat. 184). But although there be in the regulations of the corporate body directions for authenticating the acts of its agents, those directions are between the body and the agent, and are not, in general, available between the corporate body and a stranger. (*U. S. Bk. v. Dandridge*, 12 Wheat. 75; *Bk. of N. Liberties v. Cresson*, 12 S. & R. (Pa.) 306; *Russell v. McLellan*, 14 Pick. 63; *Middlesex Husbandmen v. Davis*, 3 Met. 133; *Chester Glass Co. v. Dewey*, 16 Mass. 102.)

As to the mode in which the agent of a corporation ought to frame the contract which he makes as such, the same principles are applicable as in other cases of agency, for which reference is made to the chapter of *Master and Servant*, (*Ante* p. 210, & seq. See *Hartshorn v. Whittles*, 3 Munf. 357; *Jones v. Carter*, 4 H. & M. 184; *McWilliams v. Willis*, 1 Wash. 202; *Martin v. Flowers*, 8 Leigh, 158; *Earl v. Wilkinson*, 9 Grat. 68; *Stinchcomb v. Marsh*, 15 Grat. 209, &c.; 3 Rob. Pr. (2 Ed.) 63, &c.; 1 Am. L. C. 604.

As corporations are only bound by what their agents do *within the scope of their authority* (*Mech. Bk. v. Bk. of Columbia*, 5 Wheat. 337; *Clark v. City of Washington*, 12 Wheat. 40; *Bk. of U. S. v. Dandridge*, Id. 83), it becomes an interesting question what the *precise extent* of the authority is, and especially as to the regular officers

of the association. It is important, therefore, to note that the president is not *ex officio* the agent of a corporate body to sell property which the body directs to be sold, and therefore, unless he is appointed to sell, his representations touching the property are not binding on the corporation. (*Crump v. U. S. Min. Co.*, 7 Gratt. 352.; neither has he *ex officio* power to affix the seal of the corporation to a writing. *Burr v. M. Donald*, 3 Gratt. 235-'6; *Clarke v. Imp. Gaslight Co.*, 4 B. & Ad. 24 E. C. L., 315), nor to draw checks for the corporation monies deposited in bank. *Fulton Bk. v. N. Y. & Sharon Can. Co.*, 4 Pat. Ch. R. (N. Y.), 127; *Ang. & A. Corp.* 292.; nor has the president or cashier of a bank power *ex officio* to transfer or mortgage the property or general assets of the corporation, or to charge such assets with any special responsibility, nor to discharge its debtors from their engagements. (*Hodge v. First Nat. Bk.*, 22 Gratt. 58, 61; *Bk. of U. S. v. Dunn*, 6 Pet. 51; *U. S. v. City Bk.*, 21 How. 356). When the charter allows the capital stock of a corporation to be increased at the pleasure of the corporation, the directors are not empowered to do it, notwithstanding the charter vests in them "all the corporate powers of the corporation;" for that phrase relates only to the ordinary business of the body, not to organic changes. (*Rtway Co. v. Allerton*, 18 Wal. 233, 234-'5.)

On the other hand, the president of a railroad company has *ex officio* power to contract for labor for the company, in the absence of any contrary provision in the charter or by-laws. (*Richm. Fred. & Pot. R. R. Co. v. Snead & al.*, 19 Gratt. 354.)

The authority *ex officio* of the cashier of a bank is not fully defined. See *Fleckner v. Bank of U. S.*, 8 Wheat. 338, 360-'61; *Ang. & A. Corp.* 294-'5, 297; *Morse on Banks, &c.*, 137.

In respect to the extent of the power of boards of bank-directors, which is very comprehensive, see *Bank of U. S. v. Dana*, 6 Pet. 51; *Bank of Metrop's v. Jones*, 8 Pet. 16; *Fleckner v. U. S. Bank*, 8 Wheat. 338, 355; *Ang. & A. Corp.* 293-'4.)

Notice to an agent, or to one of several co-agents, whilst engaged in the *transactions of the agency*, is notice to the corporation, but not if the notice were received whilst not so engaged. And when notice is thus brought home to the principal, it affects the corporation continuously, although its affairs afterwards fall into the hands of different persons wholly unacquainted with the fact in question. (*Mech. Bank v. Seton*, 1 Pet. 299; *Ang. & A. Corp.* 300, 301; *Richmond Enquirer Co. v. Robinson &*

als, 24 Grat. 553-'4.) So a corporation must abide the consequences of its agent's negligence, and therefore, if by reason of the default and neglect of such agent, it fails to avail itself of a defence at law, which it might have successfully asserted, it is not competent to a court of equity to relieve against the judgment thus obtained. (Earl of Oxford's Case, 2 Wh. & Tud. L. C. (Pt. II) 75, & seq., 97, & seq.; Mar. Ins. Co. v. Hodgson, 7 Cr. 332; Slack v. Wood, 9 Grat. 40; Richmond Enq. Co. v. Robinson & als, 24 Grat. 552, &c.)

In respect to the effect of an *official bond*, given by the officer of a corporation, and the extent of the obligation, see Minor v. Mech. Bank, 1 Pet. 46; Allison v. Farmers Bank, 6 Rand. 204; McGill & al v. U. S. Bank, 12 Wheat. 511; U. S. v. Kirkpatrick, 9 Wheat. 720; S. Saviors v. Bostock, 2 Bos. & Pul. N. R. 174; Hassell v. Long, 2 M. & S. 363; Peppin v. Cooper, 2 B. & Ald. (4\* E. C. L.) 431; Ang. & A. Corp. 312 to 320.)

4<sup>d</sup>. Power to Take, Hold, Transmit in Succession, and Alienate Property, as natural Persons may.

It is incident to every corporation-aggregate, at common law, to take, hold, transmit in succession, and to alienate property, *real and personal*; and this power constitutes one great element of the convenience and usefulness of these bodies politic (1 Bl. Com. 468); but experience having manifested the mischief which might ensue if the liberty of acquiring *lands*, by corporations, were unrestricted, the common law itself, imitating therein the Roman law, did not permit them to become purchasers of lands indefinitely, but only by the royal license. This jealousy was especially directed towards *religious* corporations, whose powerful influence over the consciences of men, particularly on their death beds, easily prevailed upon them to purchase a supposed immunity for sin, by benefactions to the church. Accordingly, the common law being frequently evaded, a series of statutes in England, known as the Statutes of *Mortmain*, commencing with *Magna Charta* (9 Hen. III, c. 36,—A. D. 1225), and reaching down even to 27 Vict. c. 13, (A. D. 1864), forbade, first, *religious houses*, and then any *religious person* (*i. e.*, *monk-professed* or other ecclesiastic), and *any corporation* to *purchase or hold lands* by any device whatsoever, without license from the Crown, under penalty of forfeiting them to the king. Singularly ingenious and artful were the means employed by the ecclesiastics to evade these statutes; but as often as they succeeded, parliament promptly supplied the defect; and although the contest was a long one,—being kept up with vigor by the churchmen

until A. D. 1392,—it terminated at length in the triumphant maintenance of the *Mortmain policy* through the statutes (after 9 Hen. III) of 7 Edw. I, c. 2 (A. D. 1279); 13 Edw. I, c. 32 (A. D. 1285); and 15 Ric. II, c. 5 (A. D. 1370). See 1 Bl. Com. 479; Bac. Abr. Charitable Uses (A); Wms. Real Prop. 66, & seq.; 2 Inst. Com. & Stat. Law, c. xviii.

In Virginia we have a corresponding and hardly less rigorous restriction upon corporations in respect to lands, it being enacted (V. C. 1873, c. 56 § 2,) that “no incorporated company shall hold *any more real estate* than is proper for the purposes for which it is incorporated.” It is further declared that “no company shall employ its capital, money, or effects, or otherwise engage in transactions or business not proper for those purposes; and that “one company shall not subscribe to the stock of another, unless it be specially allowed by law;” yet not so as to “prevent a company from receiving stocks or other property in satisfaction of any judgment, order, or decree, or as collateral security for, or in payment of, any debt, or from purchasing stocks or other property at any sale made for its benefit.” (V. C. 1873, c. 56, § 3.) And as the Statute of Wills with us (V. C. 1873, c. 118, § 2,) imposes no restrictions applicable to corporations, they may take by devise or bequest, subject to the foregoing qualifications, like natural persons.

Unfortunately our statute does not expressly declare, as the English Statutes of *Mortmain* do, what shall be the *consequences* of a corporation's acquiring more lands than it is permitted to hold. The better opinion, *upon principle*, seems to be that as the corporation grantee *cannot hold* the surplus contrary to law, and as the grantor *cannot have it back* against his deed, it *must be forfeited* to the Commonwealth, as where an alien illegally purchases lands. (V. C. 1873, c. 109, § 3; 2 Insts Com. & Stat. Law, c. xviii.) But see 1 Lom. Dig. 13, 14; Banks v. Poiteaux, 3 Rand. 142; Riv. Nav. Co. v. Dawsons, 3 Grat. 23, and cases cited.

If the English statutes of *Mortmain* were ever in force in Virginia (which may be doubted, seeing that they are said to be *political* in their character, and therefore *local to England*—Atto. Gen. v. Stewart, 2 Meriv. 143), they were at all events repealed by the act of 1789 (13 Hen. Stats. 23-'4), which repealed *all British statutes not re-enacted*.

With the qualifications created by the statutes above cited (V. C. 1873, c. 56, § 2, 3), or by its charter, a corporation *aggregate* may acquire and hold property of any kind, without any other limitation. Thus, a bequest to a corporation of its own stock is valid (Riv. Nav. Co. v. Dawson, 3 Grat. 20); and in order to guard against abuse it is provided (V. C. 1873, c. 56, § 3,) that while a com-

pany holds shares of its own stock, no vote shall be given thereon, which, indeed, is believed to be the common law. (*Exp. Holmes*, 5 Cow. 426; *Exp. Desdoity*, 1 Wend. 98; Ang. & A. Corp. 121.) But a corporation sole cannot take a chattel in *succession*, that is, to the corporation and his *successors*, not any more than if a chattel be conveyed to a man and *his heirs*. In both instances it goes to the *executors or administrators* of the grantee. (1 Th. Co. Lit. 192-'3, and n (K).)

It seems, however, to be a true proposition, that a corporation, except where it is otherwise provided in its charter, expressly or by clear implication, stands upon the same footing as individuals, in the use of its property, the exercise of its powers, and the transaction of its business, and is subject to the same control under the police powers of the State, or of a municipal corporation. (*Richmond, F. & P. R. R. Co. v. Richmond*, 26 Grat. 83, 95, & seq.)

It is agreed that corporations cannot exercise their powers for purposes foreign to their creation. A bank of discount and deposit cannot engage in manufactures or agriculture; nor can a road or canal company speculate in stocks or merchandize. A corporation, however, is always competent to use, for the accomplishment of its proper end, any means appropriate thereto, and thus may incidentally have transactions on its hands, in securing its debts, &c., which are in themselves very foreign to its institution. (*Riv. Nav. Co. v. Dawson*, 3 Grat. 21.) It is, moreover, often a question of nicety, whether a given transaction is within the direct scope of the proper purposes of the corporation or not; and upon this point the construction ought to be *liberal*. Unless the transaction is *clearly ultra vires*, the legality must be sustained. (*Banks v. Poiteaux*, 3 Rand. 136; Ang. & A. Corp. 117, &c.)

A corporation is not confined in its transactions, as it is in its *quasi habitation*, to the sovereignty which created it. It may make contracts, and acquire and hold property, real and personal, abroad as well as at home, wherever its charter permits, and the local law (the *lex loci contractus*, or the *lex loci rei sitæ*,) does not forbid (*Slaughter's case*, 13 Grat. 767). Thus, a corporation chartered by the State of New York, whose charter contemplated the acquisition and ownership of coal lands in Pennsylvania, having acquired such lands with the assent, express or implied, of the latter State, the purchase was held to be valid. It is for the local sovereign to prescribe the terms upon which the presence of the corporate body, by its agents, and the conducting of its operations in a foreign country, shall be permitted; but by the consent, express or implied, of the

local government it may transact there any business not *ultra vires*, that is, not beyond its chartered power or capacity. (Bk. of Augusta v. Earle, 13 Pet. 590; Runyan v. Coster, 14 Pet. 129 & seq.; Tombigbee R. R. Co. v. Kneeland, 4 How. 16; Lafayette Ins. Co. v. French, 18 How. 405; St. Louis v. Ferry Co. 11 Wal. 429; Bk. of Mariette v. Pindall, 2 Rand. 465; Taylor's Adm'r v. Bk. of Alexandria, 5 Leigh, 475; Silver Lake Bk. v. North, 4 Johns. C. R. 372.)

Blackstone states (2 Bl. Com. 477), upon the authority of several of the older writers, that a corporation cannot be seised of lands *to the use of another*—that is, cannot be a *trustee*; for, says he “such kind of confidence is foreign to the end of its institution.” And, indeed, if the limitation be attended to, the principle may be still admitted as true. A corporation cannot be a trustee for purposes *foreign to the end of its institution*; but *within those ends* it may be; and if the trust be such as it is not fitting to charge the corporation with, equity, upon its maxim of never suffering a trust to fail for want of a trustee, will devolve the duty upon some competent person. As a corporation, according to the modern construction, may be *seised to a use* not foreign to its purposes, there seems to be no doubt that it is capable of conveying lands by *bargain and sale*. (2 Kent's Com. 279; Jackson v. Hartwell, 8 Johns. 422; Phillip's Acad. v. King, 12 Mass. 546; Greene v. Rutherford, 1 Ves. Sen'r, 462, 468, 470, 475; Sonley v. Clockmakers' Co., 1 Bro. C. C. 81; Vidal v. Girard's Ex'ors, 2 How. 128.) But see 2 Lom. Dig. 187.

In consequence of this more reasonable modern construction, corporations may be, from their permanence, very useful as trustees, to conduct trusts of long continuance, and are sometimes created for that express purpose. (Trustees of Phillip's Acad. v. King, 12 Mass. 546; 2 Kent's Com. 280.)

The *modes of conveyance* to corporations are essentially the same as in the case of *natural persons* (2 Lom. Dig. 114, & n (8), 187; but there is at common law a diversity in the terms proper to be employed. In conveyances in *fee simple*, to corporations *sole*, the word *successors* is as indispensable as the word *heirs* in conveyances to natural persons. The same word *successors* is, at common law, usual and expedient in conveyances in fee-simple to corporations *aggregate*; but it is not so indispensable as in case of a corporation sole; for albeit a grant without that word passes in strictness only an estate *for life*, yet as corporations aggregate have a capacity for uninterrupted perpetual succession, an estate for the life of the corporation is,



or may be, equivalent to a fee-simple, and therefore the law allows it to be one (2 Bl. Com. 109; 1 Th. Co. Lit. 191, 501; Overseers of Poor v. Sears, 22 Pick. 122.) In Virginia this distinction is superfluous; every estate granted or devised being a fee-simple, or at least as much as the grantor or devisor has, *unless a less estate be limited*. (V. C. 1873, c. 112, § 8.)

Corporations have always had power to acquire *chattels* by will; but when, in England, the law first permitted *lands* to be devised, or willed, the statutes allowing it (32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5, A. D. 1541), specially excepted *bodies corporate*, which were declared incapable of being devisees. (2 Bl. Com. 375.) But this exception, though still retained in some of these States (2 Kent's Com. 282-'3, &c.; Ang. & A. Corp. 138, &c.), has been excluded from the Virginia statute of wills (V. C. 1873, c. 28, § 2). In England, however, by the statute 43 Eliz. c. 4, known as the Statute of *Charitable Uses*, and in force in several of these States, although not in Virginia, a corporation is enabled to be a *trustee* for *charitable uses*, even such as are so vague and uncertain as would certainly avoid them if they were *not charitable*. (2 Kent's Com. 285, & n (b).)

Whether shares in a joint stock corporation are *real or personal* property, admits, it seems, of doubt at common law, where the property of the corporation consists of *lands* (Harrison v. Harrison, 2 Atk. 337; Drybutter v. Bartholomew, 2 P. Wms. 127; Buckridge v. Ingram, 2 Ves. Jun'r, 663-'4; House v. Chapman, 4 Ves. 542; Finch v. Squire, 10 Ves. 44; Portmore v. Bunn, 1 B. & Cr. (8 E. C. L.) 694.) But in Virginia all doubt is removed by statute, which declares them always *personal estate*. (V. C. 1873, c. 57, § 21.) The transfer of shares, and the transmission after the owner's death, is thus rendered more convenient, and the property is assimilated to such as is used in trade by partnerships, which, whatever its nature, is regarded for the purposes of the partnership-trade, as having the *quality of personalty* (Stor. Conf. L. § 383, &c.; Ang. & A. Corp. 499.) It will be observed, however, that this is a question only as to the *shares in the corporation*. In respect to the corporation itself, real property is treated according to its nature, being conveyed to and by such corporate bodies with the same solemnities as if they were natural persons. (Barksdale, &c., v. Finney & als, 14 Grat. 357.)

Gifts and grants to corporations must always be by their *true name*, of which enough has been said. (*Ante* p. 511 to 513.)



In general, corporations have the same power as natural persons to dispose of their property, and do it by the same modes; but their power may be modified by charter. (*Barksdale v. Finney*, 14 Grat. 338.) There is, however, a notable diversity between natural persons and corporations, in connexion with restraints upon free alienation. In the case of natural persons, a condition *not to aliene* a fee-simple estate is for the most part void, as *repugnant* to the nature of the estate granted, and adverse to public policy; whilst a similar condition, annexed to a grant in fee-simple to a corporation, is readily admitted, because, it is said, a corporation is a political body, and can properly acquire land for *its own use only*, and not for speculative purposes, or to sell again; and so a condition not to aliene tends merely to compel the observance of its legal obligations, and to maintain it within the sphere of its duty. (2 Insts. Com. & Stat. Law, c. vii, and cases there cited.)

At common law, upon the *dissolution of a corporation*, its real estate then remaining undisposed of *reverts to the grantor*, whilst the *personal property goes to the Crown*, or with us, to the *Commonwealth*; the debt due to and from the corporation meanwhile being extinguished. Not only does its dissolution put an end to all legal or equitable proceedings, by or against it, which are yet in progress, but even upon judgments and decrees already obtained no execution can issue; and if any be issued, the court will quash it upon proof of the extinction of the corporation. (1 Bl. Com. 484; *Rider v. Union Factory*, 7 Leigh, 54; *May v. State Bank of N. C.*, 2 Rob. 56.)

In this state of the law, when a corporation is aware of its approaching end, it is usual to convey and assign all its property and debts to trustees, in trust to collect the debts, sell the property, pay the debts due from it, and to distribute the residue amongst the corporators, according to their respective interests. (*Bank of Alex'a v. Patton*, 1 Rob. 524; *May v. State Bank of N. C.*, 2 Rob. 56.) This device is now rendered needless in Virginia by a wholesome statute (V. C. 1873, c. 56, § 31), which declares that, when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members, according to their respective interests; and such corporation *may sue and be sued as before*, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts among those entitled thereto.

5<sup>d</sup>. Power to make By-Laws.

The power to make by-laws not inconsistent with the laws of the land, nor with the charter, nor unreasonable in themselves, belongs inseparably to every corporation as soon as it is created. (1 Th. Co. Lit. 184, n (C); Bac. Abr. Corp. (D); Id. By-Laws; 1 Bl. Com. 476.) And although the power is almost always conferred expressly by the charter, and in Virginia by general law (V. C. 1873, c. 56, § 1), the express grant imports no more than is implied, although it may circumscribe the latter. (Morris v. Staps, Hob. 211 a; Child v. Hudson's Bay Co., 2 P. Wms. 207; Rex v. Spencer, 3 Burr. 1837.) Eleemosynary corporations are said to be an exception to this general doctrine, and to have no further power to make by-laws than as authorized by the charter; and that because such corporations are creatures of the founder's bounty, and in the nature of *grants*, which are irrevocable, and whose terms are unalterable, either by third persons or by the grantor himself, unless power to revoke or alter be reserved—a reason which is by no means satisfactory, and tends to throw doubt upon the doctrine. (St. John's Col. v. Todington, 1 Burr. 201; Ang. & A. Corp. 328.)

As to the precise mode of enacting by-laws, and the mode of proving them, see 1 Th. Co. Lit. 184, n (C); Case of Corporations, 4 Co. 77 b; Bac. Abr. By-Laws; Ang. & A. Corp. 370-'71; Id. 347 & seq.

To whomsoever the power to make by-laws for a corporation is confided, whether to the body at large or to a select portion, it is *a trust* to be exercised with *discretion*, and therefore, by-laws which are vexatious, oppressive, and unequal, or manifestly detrimental to the corporation or to the public, *are void*. (Mitchel v. Reynolds, 1 P. Wms. 184; Gunmaker's Co. v. Fell, Willes, 388, and cases cited in note; Clark's Case, 5 Co. 64 a, note; 1 Th. Co. Lit. 184, n (C).) Thus, a by-law of a bank, that all errors in payment made or received must be corrected at the time, and not afterwards, is of no avail to prevent the enforcement of the correction of a mistake afterwards, when it is found. (Farm. & Mech. Bank v. Smith, 19 Johns. 115; Gallatin v. Bradford, 1 Bibb. 209.) So a by-law empowering shareholders, on payment of a specified percentage of their stock, to forfeit it and relieve themselves of the obligation, is void as to creditors. (Bac. Abr. By-laws (F); Slee v. Bloom, 19 Johns. 456.) Nay, if the trustees, or other proper agents for that purpose, of a corporation, neglect to collect of the shareholders what is unpaid of their subscriptions, so as to enable the company to pay its debts, any creditor, by a bill in chancery, may compel such

agents to enforce contribution from the stockholders, according to the shares taken by them respectively. (*Briggs v. Penniman*, 8 Cow. (N. Y.) 387; *Slee v. Bloom*, 19 Johns. (N. Y.) 474.) And a by-law authorizing the directors to *alter the by-laws* cannot be construed to empower them to disregard or alter a by-law which imposes a limitation upon their own powers. (*Stevens v. Davison*, 18 Grat. 819.) See *Ang. & A. Corp.* 257-'8; *Vintner's Co. v. Passey*, 1 Burr. 239; *Mayor, &c., Workingham v. Johnson*, Cas. T. Hardw. 284; *Poulterers' Co. v. Phillips*, 6 Bingh. N. C. (37 E. C. L.) 314.

The by-laws of a corporation generally provide for the transfer of shares from one person to another, but such provisions are designed only for the protection of the corporation and its officers, to show who may vote, and to whom dividends are to be paid, &c.; and, therefore, although the company's rules be not complied with in making the transfer, yet the transfer passes to the purchaser the *equitable title*; not, indeed, so as to entitle him to vote, or to receive dividends, or so as to prejudice the company's lien upon the shares transferred; but so as that a court of equity will compel the company, if it has no sufficient reason to the contrary (and giving due protection to its rights), to allow a formal transfer on its books. (*Union Bank v. Laird*, 2 Wheat. 390; *Black v. Zacharie & Co.* 3 How. 513, and cases there cited.)

A corporation has not, by the common law, a lien upon its shareholder's stock for what he may owe the company, and as such a provision is very expedient in *trading*, and especially in *banking companies*, it is commonly conferred by the charter; and if it can be created at all merely by a by-law, without authority from the charter,—it is at all events to be rigorously construed, both as to the debts included in the lien, and as to the mode of insisting thereon. (*Child v. Hudson's Bay Co.* 2 P. Wms. 207; *Ang. & A. Corp.* 355-'6.) By the effect of the act of Congress of June, 1864, touching the system of national banks, such lien is prohibited, even though declared by a by-law of a bank. (13 U. S. Stats. 102, § 35; 2 Bright Dig. 59; Rev. Stats. U. S. p. 1012, § 5201; *Bank v. Lanier*, 11 Wal. 374, &c.; *Bullard v. Bank*, 18 Wal. 594, &c.)

The power to make by-laws supposes, of course, a power to enforce them by penalties in the nature of *finer of fixed amount*, and not left to be determined, even within a *maximum*, by the governing part of the body, for that would be, in fact, to allow a party aggrieved to *assess* his own damages. But, except under special provisions in the charter, a corporation cannot inflict, as a penalty for

breach of its by-laws, disfranchisement, a denial of the share of the profits, imprisonment, or forfeiture of the member's goods, or even *of his shares*; and when, *by charter*, non-payment of instalments is visited by forfeiture or sale of the shares, it is, according to the better opinion, a cumulative remedy, which does not preclude an action for the arrears remaining due after crediting the proceeds of the sales of stock. (Herkimer Man. & Hyd. Co. v. Small, 21 Wend. (N. Y.) 273; Gratz v. Redd, 4 B. Monroe, 193-'4; 2 Lev. 201; 2 M. & S. 60; Grays v. T. Pike Co. 4 Rand. 578; Ang. & A. Corp. 362 & seq; V. C. 1873, c. 57, § 23 to 25.)

Any penalty ordained by a by-law may be generally recovered by an action of debt or assumpsit, (Bac. Abr. By-Laws (E); Chamberlain of London Case, 5 Co. 63 b; Clark's case, Id. 64 a; Surgeons v. Pelson, 2 Lev. 252; Wooly v. Idle, 4 Burr. 1952); and it seems, also, *by distress*—but by distress to be *kept as a pledge merely*, and not by distress and sale, unless authorized by statute or charter. (Clark's case, 5 Co. 64 a; Clerk v. Tucket & al, 3 Lev. 282; Adley v. Reeves, 2 M. & S. 60.)

A penalty given in general terms is for the use of the corporation, but the by-law may direct that *when recovered* in the company's name it may be assigned to whom it will; and in general the suit is to be in the name of the corporation. (Ang. & A. Corp. 366-'7.)

#### 6<sup>d</sup>. Power to Sue and to be Sued.

The power of a corporation to sue and be sued requires us to have regard to, (1), The doctrine as to the capacity of corporations to sue and to be sued; and (2), The mode of proceeding in suits by or against corporations. (1 Bl. Com. 475; Bac. Abr. Corp. (E) 2; Ang. & A. Corp. 372 & seq; Id. 558 & seq.)

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#### 1<sup>o</sup>. The Doctrine as to the Capacity of Corporations to Sue and to be Sued.

The capacity is inherent in all corporations, and relates to almost every conceivable judicial proceeding, *regular or summary*;

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#### 1<sup>t</sup>. The Doctrine as to the Capacity of Corporations to Sue.

An corporation may institute an attachment, or any appropriate action, *on any contract* into which it is capable of entering; *for any tort* (that is, any injury done to it other than by breach of contract) which it can suffer; and *for land*. (Ang. & A. Corp. 372-'3.)

Hence, there has never been any doubt even in Eng-

land, that a corporation may sue in *Assumpsit*, which is the appropriate action to recover damages for a breach of contract not under seal; for although in that country needless question has been as to the power of a corporation to bind itself otherwise than by its corporate seal, yet it has always been admitted (rather illogically) that it may *receive a promise* made to it, whether under the opposing party seal or its own, or not. (*Barber Surgeons v. Pelson*, 2 Lev. 252; *Mayor, &c. v. Gorry*, Id. 174; *Dean, &c. v. Pierce*, 1 Campb. 467.)

As a corporation *with a head* (e. g., the *mayor*, in case of the *mayor and commonalty* of a town) is incomplete without it, it cannot sue or be sued without joining the head (*Bac. Abr. Corp. (E) 2*). And where a bond or other *sealed promise* is made to an officer of the corporation *for its use*, the action must, at common law, be brought in the officer's name, and not in that of the corporation (*Offly v. Warde*, 1 Lev. 234; *Gilby v. Copley*, 3 Id. 138, &c.; *Scholey v. Mearns*, 7 East. 148; *Schack v. Anthony*, 1 M. & S. 575; *Pigott v. Thompson*, 3 Bos. & P. 148; *Ross v. Milne & ux*, 12 Leigh, 203; *Clarkson v. Doddridge*, 14 Grat. 44; 1 Chit. Pl. 3). In Virginia, however, by statute, the suit may be in the corporate name, wherever the promise is *for its benefit*, although made to another person, and under seal. (V. C. 1873, c. 112, § 2.)

A *sole corporation*, having a *natural* as well as a *corporate* capacity, must always set forth in which capacity the suit is brought; but an *aggregate* corporation has no other but a *corporate* character, and it is, therefore, needless expressly to aver that the cause of action accrued to it as a corporation. (*Bac. Abr. Corp. (E) 2*.)

A corporation is not required to show in the declaration how it was incorporated, but on the *general issue* pleaded by the defendant, it must, at common law, *prove its corporate existence*; and that not only by proving its charter, but also its organization in pursuance of the charter (*Norris v. Staps*, Hob. 211; *Henriques v. Dutch W. Indian Co.*, 2 Ld. Raym. 1535; *Bk. of Auburn v. Weed*, 19 Johns. 302; *Grays v. T. Pike Co.*, 4 Rand. 579; *Jackson v. Bk. of Marietta*, 9 Leigh, 240; *Rees v. Conococheague Bk.* 5 Rand. 326; *Taylor v. Bank of Alex'a*, 5 Leigh, 471); but in Virginia it is provided by statute, that when plaintiffs or defendants sue or are sued as a corporation, it shall not be necessary to prove the fact of incorporation, unless with the pleading which puts the matter in issue there be an *affidavit denying such incorporation*. (V. C. 1873, c. 167, § 40.)

As a foreign corporation may make any contract, and engage in any transaction which is warranted by its charter, as well without as within the sovereignty which created it, provided only that it be not repugnant to the policy of the country where the transaction occurs, so in its corporate capacity it may maintain abroad, as well as at home, any action which may grow out of such business. By an universal international comity, the mere fact that the corporation is *a foreign one* does not affect its capacity to sue. This doctrine was first clearly stated in *Henriques v. Dutch W. India Co.*, 2 Ld. Raym. 1535, and has been very often reiterated in the United States, where the intimate relations of society and business between the several States render it peculiarly important (*Bk. of Marietta v. Pindall*, 2 Rand. 465; *Rees v. Conococheague Bk.*, 5 Rand. 326; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Silver Lake Bk. v. North*, 4 Johns. C. R. 370; *Bk. of Augusta v. Earle*, 13 Pet. 519, 588; *Runyan v. Lessee, &c.*, 14 Pet. 129; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Lafayette Ins. Co. v. French*, 18 How. 405; *St Louis v. Ferry Co.*, 11 Wal. 429.)

In respect to the jurisdiction of the *United States courts* under that clause of the Federal Constitution which gives cognizance to those courts of "controversies between citizens of different States," it is now well settled (contrary to the earlier adjudications—*Hope Ins. Co. v. Boardman*, 5 Cr. 57; *Bk. of U. S. v. Deveaux*, Id. 84; *Strawbridge v. Curtis*, 3 Cr. 267; *Bk. of Vicksburg v. Slocomb*, 14 Pet. 60), that although a corporation is not properly *a citizen* at all, yet under the clause in question it is to be *deemed a citizen* of the State *which created it*, and may, therefore, maintain a suit in the court of the United States against a citizen of *any other State*. (*Louisville R. R. Co. v. Letson*, 2 How. 497, 555; *Marshall v. Balt. & O. R. R. Co.*, 16 How. 314; *Covington D. B. Co. v. Shepherd*, 20 How. 232; *O. & Miss. R. R. Co. v. Wheeler*, 1 Black. 286; *Ins. Co. v. Francis*, 11 Wal. 216; *R. R. Co. v. Harris*, 12 Wal. 65; *R'lway Co. v. Whitton*, 13 Wal. 283 )

## 2<sup>d</sup>. Doctrine touching a Corporation's Capacity to be Sued.

For whatever contract a corporation is competent to make or to violate, and for whatever *tort* it is competent to commit, it has the capacity to be sued. When the common law doctrine prevailed, that it could only express its assent to a contract by its *common seal*, it was considered that it was not subject to an action of *assumpsit*, which is adapted only to recover damages for a breach of contract *not under seal*; but as it is now,



and has long been admitted even in England, that it may make *some contracts* otherwise than under the corporate seal, it follows that the action of *assumpsit* will sometimes lie against it—namely, whenever the contract is not under seal (1 Bl. Com. 475, & n (5); London Dock Co. v. Sinnott, 8 El. & Bl. (92 E. C. L.) 350; Nicholson v. Bradfield Union, 1 Q. B. (Law Rep.) 620, 622), where the English cases are well marshalled.

In the United States it is well settled, as we have seen, that a corporation may express its assent in nearly the same ways as a natural person, to any contract, and may be sued accordingly,—namely:

1. Under its common corporate seal;
2. By vote of the corporators, in lawful meeting assembled, and entered on their records; or *perhaps* even though unwritten;
3. By vote of directors in lawful meeting, duly entered; or *perhaps* though unwritten;
4. By agents duly appointed, whose authority may be proved by any satisfactory evidence; and,
5. By accepting, knowingly, the benefit of the contract, or otherwise *ratifying* it.

See Legrand v. H. S. College, 5 Munf. 324; The Banks v. Poiteaux, 3 Rand. 141; Burr v. McDonald, 3 Grat. 206; Barksdale v. Finney, 14 Grat. 338; Bk. of Columbia v. Patterson, 7 Cr. 305; Fleckner v. Bk. of U. S. S. Wheat. 338; Bk. of U. S. v. Dandridge, 12 Wheat. 68; Eureka Co. v. Bailey Co. 11 Wal. 488; London Dock Co. v. Sinnott, 8 El. & Bl. (92 E. C. L.) 352, note.

Not only may a corporation be proceeded against directly by its own creditor, but it may be summoned and proceeded against as a *quarries* under the law of attachments, as prescribed by V. C. 1873, c. 148, § 2, &c. (Balt. & O. R. R. Co. v. Gallahue's Adm'r, 12 Grat. 655.)

As to *torts*, it is affirmed by Blackstone that a corporation can neither maintain nor be defendant to an action for *battery*, and such like *personal injuries*; for, says he, a corporation can neither beat nor be beaten in its body politic (1 Bl. Com. 477); and doubtless it is true enough that a corporation *cannot be beaten*, but it is difficult to understand why by its servants it may *not commit a battery*, and still harder to perceive why, if it shall procure such, or any other tort to be perpetrated, it should not be constrained to make satisfaction out of its corporate funds. It has accordingly been held that it may be sued for damages arising from a *neglect of duty*.



as from a turnpike-bridge or canal-locks being out of repair (Mayor of Lynn v. Turner, Cowp. 86; Townsend v. S. T. Pike Co., 6 Johns. 90; 7 Mass. 169), or from illegally obstructing a water course (C. H. T. Pike Co. v. Rutter, 4 Serg. & R. 6; where the old and modern authorities are collected). So a corporation is liable in an action of trespass in the case *in trover* for the value of chattels illegally converted to its use by its agents or officers (Yarborough v. Bank of England, 16 East. 6; Duncan v. Surry Canal, 3 Stark. 50); in trespass, or trespass on the case for *malicious injuries* committed through its directors whilst representing it (Maynard v. Firemen's Ins. Co. 34 Cal. 48; J. R. R. Co. v. Rogers, 28 Ind'a, 1); and in trespass for injuries committed *by violence* to the person or property (Britton v. So. Wales R'way Co. 3 Hurlst. & Norm. 963-'4; Bloodgood v. M. & H. R. R. Co., 18 Wend. 9; Fowle v. Alexander, 3 Pet. 409). And in Virginia the doctrine is confirmed, if confirmation were needed, by statute, allowing damages to be recovered wherever "the death of a person shall be caused by the wrongful act, neglect, or default of any person or *corporation*, and that the act, neglect or default is such as would (if death had not ensued) have entitled the party injured, &c., to maintain an action." (V. C. 1873, c. 145, § 7, &c.)

It is an invariable maxim of the common law courts (although not respected in the courts of equity), that no man shall sue himself, or any *partnership* of which he is a member (1 Bl Com. 18, 19; 1 Lom. Ex. 646, & seq.); and it therefore illustrates how wholly the individual shareholder is lost in the corporate body, that this maxim does not forbid a corporation to be sued by one of its own members, nor *vice versa*. And so, also, a member of a corporation may, at common law, secure payment of his demands against the corporation by taking a deed of trust or mortgage on its property, or by means of legal process,—as attachment, execution, or judgment,—and that in preference to other creditors (Burr v. McDonald, 3 Grat. 234; Ang. & A. Corp. 391-'2); although in Virginia, by statute (V. C. 1873, c. 51, § 63), it is declared that, in the case of corporations created by the circuit court, every such lien or incumbrance shall enure to the benefit ratably of *all the creditors* existing at the time when the lien was obtained, save only when it is made to secure a debt contracted or money borrowed at the time it was made.

It is acknowledged that a corporation-aggregate cannot be guilty of treason or of any felony, nor of any

crime which can only be adequately punished *corporeally*, and there are not wanting *dicta* that it cannot be guilty of *any crime of commission* whatever. There seems, however, to be no reason, in nature or policy, why a corporation-aggregate may not be indicted for and convicted of *any misdemeanor* whose appropriate punishment is a pecuniary mulct, whether of commission or omission. Of the latter (offences of *omission*), instances not unfrequently present themselves (*e. g.* in *nuisances* of omission); but cases of *commission* are not wanting—*e. g.* *obstructing highways*, &c. When a crime of more heinous character is perpetrated in connection with the affairs of a corporation, the persons guilty of it, although officers and agents of the corporate body, are to be prosecuted *personally*; and, indeed, they are liable also to be proceeded against personally for all the torts and misdemeanors for which an indictment or action lies against the corporation. (Hawk. P. C. B. I, c. 66, § 13; Id. c. 76, § 8; Reg. v. B. & Cr. R'way Co., 9 Carr. & P. (38 E. C. L.) 469.) Thus, in *King v. Mayor, &c., of Liverpool*, 3 East. 86, and in *Reg. v. Mayor, &c., of Lincoln*, 8 Ad. & El. (35 E. C. L.) 65, no question was made that a corporation was indictable for *not repairing a highway*; nor in *King v. Mayor, &c., of Stratford*, 14 East. 348, for the *non-repair of a bridge*; and in *Reg. v. Scott*, 3 Ad. & El. N. S. (43 E. C. L.) 549, it was agreed that it was liable to indictment for *obstructing a highway*. In Virginia, at all events, there is no doubt that a corporation is, in *some cases*, liable to indictment, presentment, or information (however it may be a question *what the cases are*); for we have a statute providing that on any such prosecution the summons may be served on the corporation, as in civil suits (see *Post* p. 565 & seq.); and if it fail to appear, the court may proceed to trial and judgment without further process, as if defendant had appeared and pleaded *not guilty*. (V. C. 1873, c. 201, § 29.)

Whether a foreign corporation is capable of *being sued* in any State depends on the statute-law thereof touching the mode of serving process, and generally of proceeding against *non-resident parties*. A non-resident natural person may come within the limits of the State, and is then universally as liable to the process of the courts as if he were a citizen; but a foreign corporation cannot leave its proper *habitat*, the country where it was created; and although its officers may do so, yet as there is no natural principle of law which enjoins that process against a corporation shall in all cases be served

on any particular officer, the *statutes of the State* where the suit is brought can alone determine how the process shall be executed, or whether it can be executed at all. The provision in Virginia for proceeding against non-residents is comprehensive enough to include, and does include, non-resident corporations. "On affidavit," says the statute, "that a *defendant* is a non-resident of this State, \* \* \* an order of publication may be entered against *each defendant*." (V. C. 1873, c. 166, § 10; U. S. B'k v. Merch. B'k, 1 Rob. 586 to 590; Balt. & O. R. Co. v. Gallahue, 12 Grat. 655; Beaston v. Farmers B'k, 12 Pet. 134.)

If the proceeding meditated against the foreign corporation involve consequences incompatible with its foreign *habitat*, and the necessarily alien character of the defendant, that proceeding cannot be maintained. Hence, where in New York, upon a statutory summary process, it was provided that the defendant might supersede the process, upon giving security to *appear and plead to any action at law, or in equity, brought against him in the State, within six months*; and as there was no law allowing an *ordinary suit* thus contemplated to be instituted against a foreign corporation, it was held that neither did such summary process lie against it. (McQueen v. M. Man. Co., 16 Johns. 4.) But if nothing is required, in respect to the proceeding in question, but that the defendant should *appear and plead to that process*, or should give security to perform the decree or order *in that cause*, these may be done by a foreign corporation by attorney or agent, and therefore do not preclude the proceeding against it. (U. S. B'k v. Merch. B'k, 1 Rob. 588-'9.) Upon this ground, in the case last named, an *attachment in chancery* against a foreign corporation was sustained, and doubtless any other kind of attachment would be, under the statute (V. C. 1873, c. 148, § 1 to 5, 11.) And so, process of *interpleader* (V. C. 1873, c. 149, § 2, 3), and process of distress (V. C. 1873, c. 134, § 7 & seq), seem to be in like manner available against such a corporation. (Allen & als v. Hart, 18 Grat. 723.)

And in this connection, let it be observed that, for *civil purposes*, corporations are in law deemed *persons*, and will, therefore, be comprehended in that phrase wherever it occurs in giving a remedy or otherwise, unless the context demands a contrary construction. (U. S. v. Amedy, 11 Wheat. 393; Beaston v. Farmers Bk, 12 Pet. 134-'5; Stribbling v. Bk. of Valley, 5 Rand. 132, 140 & seq; U. S. Bk. v. Merch. Bk, 1 Rob. 589-'90;

Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 655; West. U. Tel. Co. v. Richmond, 26 Grat. 20.)

It may be stated here, although it belongs more properly to the next head, that after the property of a foreign corporation has been transferred to and vested in a receiver, for the benefit of its creditors, under an order of a court of equity in the State where the corporation has its abode, it cannot be reached as the *property of the corporation*, by an attachment in another State. (Thomas v. Mech. Bk. 9 Pai. (N. Y.) 215; Ang. & A. Corp. 399.)

An interesting question arose in Clarke v. N. J. St. Nav. Co., 1 Stor. Circ. Ct. 531, namely, whether the United States courts sitting in one State, can take cognizance of a suit *in personam*, in Admiralty, against a corporation created by another. It was held by Mr. J. Story, that although by the *common law* foreign corporations and non-resident aliens cannot be served with process by any of the courts of common law, nor their property *be attached* to compel their appearance, yet the district courts of the United States (as *courts of admiralty*) may *award attachments* against the property of either found within their local jurisdiction, for they then proceed, as courts of admiralty delight to 'do, *in rem*, by virtue of their jurisdiction *over the property itself*, and thus indirectly acquire a jurisdiction *in personam*, in which aspect it is immaterial whether the property belongs to a natural person or to a corporation.

## 2°. Mode of Proceeding in Suits by or against Corporations; W. C.

### 1°. Mode of Proceeding in Suits where the *Corporation* is *Plaintiff*.

A corporation must sue in its true name, accurately stated, and in its *declaration* or complaint (except it be an ancient body existing *by prescription*), it ought to state the *fact of its incorporation*, although it is not needful to set out the charter itself; nor, indeed is the averment, that it is a corporation, *indispensable*, though it be proper (1 Chit. Pl. 286, 416; Taylor v. Bank of Alexandria, 5 Leigh, 475; Lithgow's case, 1 Va. Cas. 305; Rees v. Conococheague Bk, 5 Rand. 329-'30; Case of Mayor, &c., Lynne Regis, 10 Co. 120). But at common law the *fact of incorporation* must be proved *at the trial*, unless it be *admitted in the pleadings*, or unless the charter be a *public statute* (of which the courts must *ex officio* take notice), as the *charters of our own banks* are held to be in Virginia, (Stribbling v. Bk. of Valley, 5 Rand. 132; Hays v. N. W. Bk. 9 Grat. 130). Thus, upon the general issue of *nil debet*, or *non assumpsit* (pleas which do not

admit the fact of incorporation), and also in case of all *motions* for judgment (*e. g.*, against delinquent shareholders), proof of incorporation is requisite at the trial, wherever the charter is *not a public statute*, (*Henriques v. Dutch W. Ind. Co.*, 2 Ld. Raym. 1532; *Grays v. T. Pike Co.*, 4 Rand. 578; *Rees v. Conococheague Bk.*, 5 Rand. 329-'30; *Taylor v. Bk. of Alex'a*, 5 Leigh, 475; *Jackson v. Bk. of Marietta*, 9 Leigh, 240; *Bowyer v. T. Pike Co.*, 9 Grat. 109). But this common law obligation on the plaintiff to prove the fact of incorporation at the trial, is materially qualified in Virginia by statute (V. C. 1873, c. 167, § 40), which enacts that where plaintiffs or defendants sue or are sued *as a corporation*, it shall not be necessary to prove the *fact of incorporation*, unless with the pleading which puts the matter in issue, there be an *affidavit denying such incorporation*.

The fact of the existence of a corporation is to be established, in general, by proof of the charter, of which, if it be by *public statute*, the courts will *ex officio* take notice—that is, supposing it to be a domestic corporation. If the charter be by private statute, or by order of a circuit court, or if it be a *foreign corporation*, the courts do not *ex officio* notice it, but it *must be proved*, in case of a *foreign* corporation, by a copy of the charter, *exemplified* under the great seal of State, or by an *examined copy*; and if it be a *domestic* corporation, by a copy certified by the Secretary of State, or an examined copy if granted by a circuit court or judge; or if granted by the Legislature, by a copy certified by the *keeper of the rolls*, or an examined copy, or a copy purporting to be printed by the public printer. A legislative charter from another State of the Union may also be proved by a copy printed by authority, and so may a charter granted by Congress. (1 Bright Dig. 265; V. C. 1873, c. 15, § 8; Id. c. 14, § 14; *Taylor v. Bank of Alexandria*, 5 Leigh, 471; *Thompson v. Musset*, 1 Dal. 462; 6 Binn. 321; 2 Stew. & Port. (Ala.) 91; 3 Pick. 293; *Dwarris' Stats.* (Potter's Ed.) 57, 60; *Ante* p. 40, 41.)

Where the mere charter does not create the corporation, but something additional is required to be done in the way of *organization*, &c., it is requisite to prove, not the existence of the charter only, but also that the steps subsequently contemplated were taken, and the company duly organized, &c. (*King v. Mothersell*, 1 Stra. 93; *Rex v. Martin*, 2 Campb. 101, & note; *Grays v. T. Pike Co.* 4 Rand. 578; *Owings v. Speed*, 5 Wheat. 420.) But the holding of meetings under the charter, the election of officers, and the doing of other corporate acts,

are in general sufficient evidence of the existence of a company. (Ang. & A. Corp. 70; *Ante* 520-21.)

It may be added that it is no defence to an action by a corporation, that its charter was obtained by fraud, nor that by *non-user*, or *mis-user*, it is *liable* to be forfeited. These circumstances may be good ground for cancelling the charter; but that can be done only upon a writ of *quo warranto* instituted in the name of the Commonwealth for the purpose, and until the forfeiture is *judicially declared*, no advantage can be had of it in collateral suits. (Crumph v. U. S. Min. Co. 7 Grat. 352; People v. Manhattan Co. 9 Wend. 351; Trent v. Cartersville Bridge Co. 11 Leigh, 529.)

A *plea by a corporation* must *purport to be by attorney*, the body being incapable of appearing *in person*, as a natural person may; and it is also safer, if not necessary, that the declaration likewise should *purport to be by attorney*. (1 Chit. Pl. 554.)

## 2<sup>d</sup>. Mode of Proceeding where a Corporation is Defendant.

It will be expedient here to follow the proceedings more into detail, and to show, (1). The place where, in Virginia, suit is to be instituted against a corporation; (2). The process to be employed to commence a suit or action against a corporation; (3). Mode of serving process on a corporation; and (4). Proceedings in suits against corporations after process served:

W. C.

### 1<sup>st</sup>. The Place where, in Virginia, suit is to be instituted against a corporation.

The rule is prescribed by statute, and is the same for actions at law and suits in equity. (V. C. 1873, c. 165, § 1 to 3.) The statute enacts that actions at law or suits in equity, except where otherwise specially provided, may be brought in the circuit or corporation court of any county or corporation, if a corporation be defendant, wherein is—

1. Its principal office; or,
2. Its mayor, rector, president, or other chief officer resides; or,
3. Wherein the cause of action, or *any part thereof*, arose; or,
4. Wherein, in an action on a policy of insurance, the property insured is situated, or the person whose life is insured resides, at the date of the policy. (V. C. 1873, c. 165, § 1. (cl. 2).)

### 2<sup>d</sup>. The Process to be Employed to Commence a Suit or Action against a Corporation.

At common law, no writ of *capias ad respondendum*.



or other writ *of arrest*, lies against a corporation, for its existence being ideal only, it is incapable of being apprehended or committed to prison; and therefore it cannot be *outlawed*, for outlawry supposes a precedent right of arresting, which has been defeated by the party's absconding; and that also a corporation cannot do. For these reasons the proceedings to compel a corporation to appear to any suit by attorney are, at common law, always *by distress* on its goods, and the profits of its lands, after a summons has been executed and not obeyed. And as it *has no soul*, as Lord Coke gravely observes, it is not liable to be summoned into the ecclesiastical courts on any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures, which with corporate bodies would be misplaced and futile. (1 Bl. Com. 477; 1 Tidd's Pr. 121.)

In Virginia the statute indicates the process to be a *writ of summons*, commanding the officer to *summon* the defendant to answer the bill or action (V. C. 1873, c. 166, § 5). No distinct provision is made by the statute to *compel corporations* specifically to answer to the suit or action, but the general methods prescribed for that purpose are not inapplicable to corporations, whether at law (V. C. 1873, c. 172, § 44, 45) or in equity (V. C. 1873, c. 167, § 47, 48), and in equity are well supplemented by the *process of distress* used at common law, and, if necessary, the proceedings for contempt (Stor. Eq. Pl. § 44; Barton's St. in Eq. 47, 91.)

### 3<sup>d</sup>. Mode of Serving Process on a Corporation.

At common law the original summons against a corporation is served on the head officer, and if the defendants do not appear in due time by attorney, the next process is a writ of *distringas*, in pursuance of which the officer is to distrein the corporation by its goods and by the profits of its lands, but not by the property of the individual corporators; so that, if the body has neither lands nor goods, there is no way to *compel it* to appear at law or in equity. (1 Tidd's Pr. 121.)

In Virginia the statute provides that process against or notice to a corporation may be served on its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he *resides*, or in which is the *principal office* of the corporation, if it be a city or town, on the president of the council, or board of trustees, or in his absence, on the recorder, or any alderman or trustee; and if it be not



a city or town, on the cashier or treasurer; and if there be none such, or he be absent, on a *member* of the board of directors, trustees, or visitors. If the case be against a *bank of circulation*, and be in a county or corporation wherein the bank has a *branch*, service on the president or cashier of such branch bank shall be sufficient; and if the case be against some other corporation than a bank, and there be not in the county or corporation wherein it is commenced any other person on whom there can be service as aforesaid, service on an *agent of the corporation*; and if no such agent, publication of a copy of the process or notice, as an order of publication is published (V. C. 1873, c. 166, § 7, 14), shall be sufficient. Service on any person under these provisions shall be in the county or corporation in which he resides; and the return shall show this, and state on whom and where the service was; otherwise the service shall not be valid. And similar proceedings are also provided when an action is brought against a corporation before a justice of the peace, upon small demands. (V. C. 1873, c. 166, § 7; Id. c. 56, § 32 to 35; Barksdale v. Neal, 16 Grat. 319.)

Let it be observed, that in construing this statute in respect to suits where the *branches of banks* are concerned, the suit is to be brought and the declaration filed, not against the branch, but against the *mother bank*, by its proper corporate name, the statute only allowing the process against the mother bank to be served on the officers of the branch. (Tompkins v. Branch Bank, 11 Leigh, 372; Mason v. Farmers Bank, 12 Leigh, 84.)

In order clearly to apprehend the effect of these enactments, it will be requisite to consider them in conjunction with the statute which prescribes *where* suits shall be instituted (V. C. 1873, c. 165, § 1 (cl. 2), § 2: *And* p. 564), and with the provision (V. C. 1873, c. 166, § 2), which directs *what officer* may execute process. It is furthermore necessary to take the three several cases contemplated by the statute (V. C. 1873, c. 165, § 1, 2), for the locality of the suit, separately:

1. Where the suit is commenced (pursuant to V. C. 1873, c. 165, § 1) in the county or corporation wherein the *chief officer resides*.

The process *must* be served on him, unless he be absent from the county or corporation. In that event the plaintiff has several options:

(i). To serve process on the *next subordinate* named in the statute, who may reside therein;

(ii). To serve process on the *next subordinate* named *in order of rank* in the county or corporation wherein *he resides*, not resorting to an inferior unless the superior be *absent from his county or corporation*:

(iii). To serve process, in the absence from the county or corporation where *suit is brought*, of all the named subordinates *who reside therein*, on *any agent* of the corporation (not being a bank) *resident therein*, with publication, &c.

2. Where the suit is commenced (pursuant to V. C. 1873, c. 165, § 1,) in the county or corporation wherein the *chief office is*.)

The process *must* be served on the chief officer, if he *reside therein*, unless he be *absent from the county or corporation*. In that event, or if he *do not reside there*, the plaintiff has several options:

(i). To send process to the county or corporation where the *chief officer resides*, to be executed on *him*;

(ii). To serve process on the next subordinate named, who *may reside* in the county, &c., where suit is brought;

(iii). To serve process on the next subordinate named, *in order of rank*, in the county or corporation wherein *he resides*; not resorting to an inferior, unless the superior be *absent from his county or corporation*;

(iv). To serve process, in the absence from the county or corporation *where the suit is brought*, of all the named subordinates *who reside therein*, on *any agent* of the corporation (not being a bank) *resident therein*, with publication, &c.

3. Where the suit is commenced (pursuant to V. C. 1873, c. 165, § 2) in the county or corporation where the *cause of action arose*.

The process *must* be served on any of the officers named (chief or subordinate), *in order of rank*, who *may reside therein*, and are not at the time *absent therefrom*. If there be none, then the plaintiff has here also several options:

(i). To serve process on any agent of the corporation (not being a bank), *resident therein*, with publication, &c.;

(ii). To serve process on the officers named (chief and subordinate), *in the order of rank*, in the county or corporation wherein each *respectively resides*; not resorting to the inferior, unless the superior be *absent from his county or corporation*.

But this last alternative is allowed only in case the corporation be a *railroad, canal, turnpike, or telegraph company*. (V. C. 1873, c. 166, § 2.)

4. Where the suit is commenced (pursuant to V. C. 1873, c. 165, § 1) in the county or corporation where *insured property* is, or a person whose *life is insured resided* at the date of the policy.

The process is to be served as in the preceding case (3, *supra*); or if the corporation be a *foreign insurance company*, it may be served upon the agent of such company, resident in the Commonwealth, whom the law requires to be appointed. (V. C. 1873, c. 36, § 20, 23.)

4<sup>th</sup>. Proceedings in Suits against Corporations, after Process Served.

The proceeding against a corporation, after once it has been properly convened before the court, is substantially the same as in case of a natural person. Whether plaintiff or defendant, the corporation ought to be designated by its true name; and at common law, if a mistake occurs in either, it may be taken advantage of by a plea *in abatement* for the *misnomer*, but not by a *plea in bar*, in consequence of any supposed variance from the alleged cause of action, that is, unless there be no such corporation *in rerum natura*. (1 Chit. Pl. 282; Mayor, &c. of Stafford v. Bolton, 1 Bos. & Pul. 40; Jowett v. Charnock, 6 M. & Selw. 46; Boughton v. Frere, 3 Camp. 29; Doe v. Miller, 1 B. & Ald. (4<sup>th</sup> E. C. L.) 753.) In Virginia, by statute, no plea in abatement for *misnomer* is allowed in any action; but the declaration may on the *defendant's motion*, and on affidavit of the right name, be amended by inserting the right name. (V. C. 1873, c. 167, § 18.) And where the contract, being in writing, is made by or to a corporation, by a name different from its true name only *in syllabis et verbis*, and not *in sensu et re ipsa*, the best course is to sue by the *right name*, and aver in the declaration, in describing the writing, that it was made by or to the body by the name mentioned in the instrument, by which name as well as by the right name it is called and known. Of course the identity of the corporation named in the instrument, with that which sues, or is sued, must be made to appear at the trial, a diversity *in syllabis et verbis* being of no importance if it appear by express averment in the pleadings, or by the finding of a jury, that the bodies are one and the same. (Case of Mayor, &c. of Lynne, 10 Co. 125 b; Culpeper, &c. Man. Soc. v. Digges, 6 Rand. 167-'8; Ang. & A. Corp. 583 & seq.)

The testimony of a corporator is not at common law admissible for the corporation, wherever any advantage, however slight, can redound to him from his tes-

timony; save only for collateral purposes, as to prove the custody or loss of a document, &c.: But where the members of the body corporate have no private pecuniary interest therein, they are competent witnesses, as in case of the trustees or members of a purely charitable foundation, such as a hospital, &c. So they may in general be made competent by assigning their shares, fully paid up, or by a legal sentence of disfranchisement. (Rex v. Mayor of London, 2 Lev. 231; Stevenson v. Nevinson, 2 Stra. 583; S. C. 2 Ld. Raym. 1533; Mayor of Colchester's case, 1 P. Wms. 595; Ang. & A. Corp. 587-'8, 593.) But at present, in Virginia, interest constitutes no disqualification to testify. "No witness," says the statute, "shall be incompetent to testify because of interest." (V. C. 1873, c. 172, § 21.)

Whether the admissions of a member of a corporate body may be proved against the body, is a question not wholly settled. It would seem that whenever a corporator may not at common law be examined as a witness, he has *such a joint interest* as would make his admissions evidence against the corporation more or less persuasive, according as his opportunity and motive to ascertain the truth of the fact admitted were greater or less. (1 Greenl. Evid., § 175, & n 4; Ang. & A. Corp. 592.)

Proceedings in equity, by a corporation *as complainant*, are, in the main, conducted in like manner as by a natural person; and with us the same rule prevails as at law touching the necessity and modes of proving the incorporation. (*Ante* p. 562-'63.) Proceedings against a corporation *as defendant*, are marked by several diversities as compared with those against a natural person. Thus, the *answer* of a corporation must be under the *common seal*, instead of under oath; but so far as it is responsive to the bill, it has the same effect as if it were sworn to. (Mitf. Eq Pl. 9; Stor. Eq. Pl. § 874; Bart. St. in Eq. 110; Rex v. Windham, Cowp. 377; Anon. 1 Vern. 117; Thornton v. Gordon, 2 Rob. 719; Balt. & O. R. R. Co. v. Gallahue, 12 Grat. 655); and where the custodian of the common seal refuses to affix it to an answer to which the proper authorities have assented, he may be constrained to do it by *mandamus*. (Rex v. Windham, Cowp. 377.)

As the answer thus, under the *common seal*, how false soever it may be, involves no perjury, where an appeal is really desired to be made to somebody's conscience for a discovery of facts, it is customary to make such of the officers or individual corporators as are

supposed to be personally cognizant of them, parties defendant along with the company itself; and notwithstanding the general rule in equity is that a mere witness shall not be made defendant to a bill, yet the convenience of the practice in question has caused it to be long employed both in England and in this country. (Bac. Abr. Corp. (E); Wych v. Meal, 3 P. Wms. 310; Moodalay v. Morton, 1 Bro. C. C. 469; Dummer v. Chippenham, 14 Ves. 245, 252; Stor. Eq. Pl. § 235.)

Independently of statute, the appearance and answer of a corporation are compelled in equity, after service of the first process of *subpoena* (as the summons in chancery is styled), by *distringas*, or distress of the corporate chattels and the profits of the lands; and if that be unavailing, by further process of contempt. (Stor. Eq. Pl. § 44; Ang. & A. Corp. 597, & seq.) In Virginia, the summons is in like terms as at law, and is followed by like orders, taking the bill for confessed, and entering a decree by default against the defendant, and, if need be, constraining an answer by process of contempt. (V. C. 1873, c. 107, § 43, 47, 48; *Ante* p. 565.)

7<sup>d</sup>. Power to remove Members and Officers.

See 2 Kent's Com. 224; Ang. & A. Corp. 83; *Ante* p. 525 & seq.

3<sup>c</sup>. Disabilities of Corporations.

The disabilities of corporations are thus summed up, not with entire accuracy, by Sir Wm. Blackstone. (1 Bl. Com. 476-'7.) Numbers are attached to the several propositions, in order to point out those inaccuracies, or the changes in doctrine which have occurred since he wrote:

(1). "It must always appear by attorney, for it cannot appear in person, being, as Sir Edw. Coke says, invisible, and existing only in intendment and consideration of law;

(2). "It can neither maintain, nor be made defendant to, an action of *battery*, or such like personal injuries; for a corporation can neither beat nor be beaten in its body politic;

(3). "A corporation cannot commit treason or felony, or other crime, in its corporate capacity, though its members may in their distinct individual capacities;

(4). "Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood;

(5). "It cannot be executor or administrator, or perform any personal duties; for it cannot *take an oath* for the due execution of the office;

(6). "It cannot be *seised of lands to the use of another*,

for such kind of confidence is foreign to the end of its institution;

(7). "Neither can it be committed to prison; for its existence being ideal, no man can apprehend or arrest it.

(8). "And therefore, also, *it cannot be outlawed*; for outlawry always supposes a precedent right of arresting, which has been defeated by the party's *absconding*, and that, also, a corporation cannot do; for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always *by distress* on their lands and goods;

(9). "Neither can a corporation be *excommunicated*; for it has no soul, as is gravely observed by Sir Edward Coke;

(10). "And therefore, a corporation is not liable to be summoned into the ecclesiastical court upon any account; for those courts act only *pro salute animæ*, and their sentences can only be enforced by spiritual censures."

We have seen, in the course of the discussion, that some of these propositions have been by subsequent authorities overruled, and others qualified, and it will, therefore, be expedient to consider them in order;

W. C.

1<sup>d</sup>. Disability of a Corporation *to appear in Person*.

This disability exists as stated by Blackstone.

2<sup>d</sup>. Disability to Maintain, or be made Defendant to, an *action of battery*, or such like personal injuries.

The modifications of this doctrine have been set forth *Ante* p. 558.

3<sup>d</sup>. Disability *to commit Treason or Felony, or other crime*.

This is true as to treason or felony. As to misdemeanors, which may be appropriately punished *by fines*, it is materially qualified. See *Ante*, p. 559.

4<sup>d</sup>. Disability to suffer Corporal Penalties, or to be liable to Attainder.

This disability exists as stated by Blackstone.

5<sup>d</sup>. Disability *to be Executor or Administrator*.

This disability was never applied to any but corporations *aggregate*, for as corporations *sole* can prove the will and take the oath, they were never considered to be within the disability. And it seems to be now settled that when even an *aggregate corporation* is named executor, it may appoint persons styled *syndics* to receive administration with the will annexed, who are sworn like other administrators. It is remarkable that Blackstone should have taken no notice of this qualification, seeing that it had been exemplified in the will of Mr. Viner, whereby he endowed the professorship by virtue of which the commentator was delivering the lectures which constituted the substance of his great work. Mr. Viner had substantially constituted the Uni-



versity of Oxford his executor, which committed the work to several members of the university convocation, as *administrators with the will annexed*. (1 Bl. Com. 28, note (h); Bac. Abr. Ex'or (A), 2; 1 Com. Ex. 165-6.)

6<sup>d</sup>. Disability to *stand Seised to a Use*, or to be a *Trustee*.

It is true, as Blackstone suggests in referring to this disability, that a corporation, being a *political institution*, set on foot for objects of public benefit, has no other capacities and powers than are necessary, or fairly auxiliary, to effect the purposes of its creation. But it is now perfectly settled that it may be *seised to uses*, either as a feoffee or bargainer, and *a fortiori* may be a *trustee* for purposes *not foreign to its institution*. And whenever a corporation may be a trustee, equity will compel a due observance and fulfilment of the trust; and, as we have seen (*Ante*, p. 550), if the corporation is not competent, for any reason, to fulfil the trust, equity will supply another trustee. (2 Kent's Com. 279; 2 Th. Co. Lit. 601. n (C); Gilb. Uses, &c., 6, & seq. n (1); Id. 367; Atto. Gen. v. Utica Ins. Co., 2 Johns. C. R. 389; Jackson v. Hartwell, 8 Johns. 422; Phillips' Acad. v. King, 12 Mass. 546; Sutton v. Cole, 3 Pick. 232; Anherst Acad. v. Cowes, 6 Pick. 427; Vidal v. Girard's Ex'ors. 2 How. 127; Dummer v. Chippenham, 14 Ves. 252-3; Atto. Gen. v. Foundling Hospital, 2 Ves. Jr. 42, & n (2).)

7<sup>d</sup>. Disability to be *Imprisoned*.

This disability, of course, exists without modification, and is attended by the general consequences stated by Blackstone.

8<sup>d</sup>. Disability to be *Outlawed*.

This disability, doubtless, remains without change with us.

9<sup>d</sup>. Disability to be *Excommunicated*.

As we have no ecclesiastical authority in this country clothed with civil power, there can be no such process with us as that of excommunication, of which the law takes cognizance.

10<sup>d</sup>. Disability to be *Summoned into the Ecclesiastical Courts*.

We have no ecclesiastical courts in Virginia, and, of course, a corporation can be under no disability in respect to them, any more than a natural person.

5<sup>b</sup>. The Relation of Members to the Corporation; W. C.

1<sup>c</sup>. Personal Liability of Members for the Contracts and Torts of the Corporation.

In general the members individually are not responsible for the engagements of the body corporate, or for its torts. In the case of corporations *not municipal*, the members are liable only when it is so provided in the charter or by some general statute, or when they have been so



*personally* concerned in the transaction as to have made themselves liable by their own act, either by a promise, in case of *contract*, or in case of *tort*, by participating therein. (Bac. Abr. Corp. (E) 5; Harman v. Tappenden & als, 1 East. 555; S. C. 3 Esp. 278; Anderson v. Com'th, 18 Grat. 295, 297, & seq.; 2 Kent's Com. 272, n b. But see Harvey v. E. India Co., 2 Vern. 396, note, citing Salmon v. Hamborough Co.) But municipal corporations, such as cities, counties, &c., having usually no corporate fund, each inhabitant is liable for every established demand against it, if the *statute* gives a suit against such a community. (2 Kent's Com. 274; *Ante* p. 503.)

2<sup>c</sup>. Nature and Transfer of Stock in *Joint-Stock Corporations*.

In corporations constituted for municipal or eleemosynary or religious purposes and the like, although the bodies may be possessed of vast wealth (*e. g.* the corporation of Trinity church in New York), yet the individual corporators have no separate interest therein, but are mere trustees for the purposes of the charter. . But companies organized for business purposes, and for profit to their members, consist usually of persons who have taken shares in the enterprise, and are denominated *joint-stock companies*. The principles which regulate the *subscription* for shares are stated *Ante* p. 528 & seq., and those which relate to the transfer of shares are mentioned *Ante* p. 523 & seq.

6<sup>b</sup>. The Visitation of Corporations.

Corporations being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons or authorities to visit, enquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. The visitatorial control exercised over eleemosynary corporations, however, differs so materially from that which is applicable to such as are ecclesiastical or civil, that some writers have proposed to employ the phrase *visitation* in respect to eleemosynary corporations alone (2 Kent's Com. 304; 1 Bl. Com. 481, n's (c) and (12);) but as the idea and object of visitation is to have a controlling authority outside of the corporation itself, to constrain it to fulfil its functions, it will probably tend more to clearness of apprehension to adopt Blackstone's view of the subject. (1 Bl. Com. 480.) Let us consider, therefore, the doctrines applicable to—(1), The visitation of ecclesiastical corporations; and, (2), The visitation of lay corporations.

W. C.

1°. The Visitation of *Ecclesiastical Corporations*.

The *ordinary* is the visitor of ecclesiastical corporations—that is, the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge or coercion of all his suffragan bishops; and the bishops, in their several dioceses, are the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations, a power which they usually exercise, so far as concerns coercion, through the several orders of ecclesiastical courts. (1 Bl. Com. 480; Id. 380-'81, 382; Bishop of St. Davids v. Lucy, 1 Ld. Raym. 447; S. C. Id. 539.)

In this country there are, for the most part, no ecclesiastical corporations. But if there should be any, as there are no spiritual authorities by law established with us, it is supposed they are to be visited in the same manner as such as are eleemosynary.

2°. The Visitation of *Lay Corporations*; W. C.

1<sup>a</sup>. The Visitation of *Eleemosynary Corporations*.

It is said that no other corporations go under the name of eleemosynary but *colleges, schools and hospitals*, and they are so only when they bestow their advantages *gratuitously*. At common law they are visited by the founder or his heirs, or as the founder shall appoint; and by the founder is commonly meant the *endower*, whom Blackstone denominates the *fundator perficiens*, in contradistinction to the Crown, which is the *fundator incipiens*. If, however, the King and a private man join in an endowment, the King, by his prerogative, is to be deemed the founder, both *perficiens* and *incipiens*, and consequently the King is the visitor, and exercises his functions as such for the most part in the King's bench, but sometimes in the court of chancery.

In Virginia the same principles prevail. Eleemosynary corporations are visited as the founder shall direct, or in the absence of any direction, by the founder himself or his heirs, observing that if any part of the endowment is supplied *by the Commonwealth*, it constitutes the Commonwealth the founder and visitor, a function which it exercises through the *legislature*, and also *through the courts*,—for the most part the *courts of law*,—and by means of the writs of *mandamus* and *quo warranto*.

The visitor appointed by the founder, or the founder and his heirs, if they act as visitors, determine finally and *without appeal* all questions relating to the interior polity and administration of the institution (1 Bl. Com. 483-'4, & n (5); Phillips v. Bury, 1 Ld. Raym. 5; King v. Bishop

of Ely, 2 T. R. 290; St. John's Coll. v. Bishop of Ely, 1 Burr. 200; 2 Kent's Com. 302); but the visitor is still not beyond the reach of the law. In respect of contracts made lawfully, and trusts assumed, the court will always constrain the observance of justice and right; and the court of chancery, by virtue of its general jurisdiction in cases of abuse of trust, and of fraud, will grant redress in such cases; and where the corporation is a mere trustee of a charity, it will, if need be, take away the trust altogether, and vest it in some other hands. (2 Kent's Com. 303-'4; Atto. Gen. v. Foundling Hosp. 2 Ves. Jun. 42; Dartmouth Col. v. Woodward, 4 Wheat. 676, Story, J.)

2<sup>d</sup>. The Visitation of *Civil Corporations*.

Blackstone insists that civil corporations being always founded solely by the King, the right of visitation results to him by the same rule as in eleemosynary corporations, by virtue of being such founder; his functions being exercised, as in that case, in the courts of justice. At all events, civil corporations are, in fact, visited and controlled by the King's court,—usually by the court of King's bench, by means of the writs of *mandamus* and *quo warranto*.

In Virginia also, civil corporations (whether public or private) are visited and restrained, or kept up to their duty, *in the courts*;—for the most part *courts of law*, and by means of the same writs of *mandamus* and *quo warranto*. (2 Kent's Com. 304; Com'th v. James Riv. Co. 2 Va. Cas. 190; Ang. & A. Corp. 610, 630, & seq. 684, & seq.)

7<sup>b</sup>. Judicial Proceedings to restrain and direct Corporations in the exercise of their Functions and Franchises; W. C.

1<sup>c</sup>. Writ of *Mandamus*.

A writ of *mandamus* in the name of the *Commonwealth* may, with us, issue from a circuit or corporation court, directed to any person, corporation, or inferior court within the State, requiring to be done some *particular ministerial act* therein specified which appertains to their duty. It is a writ of an extensively remedial nature, and issues in all cases where the party has a right to have any ministerial act done, and has no other specific and adequate means of compelling its performance, or of obtaining redress. A *mandamus*, therefore, lies to compel the admission or restoration of the party applying, to any officer in a corporate company; to academical degrees; to oblige bodies corporate to affix their common seal, &c. (3 Bl. Com. 110; Booker v. Young, 12 Grat. 303, 306; 3 Bl. Com. 264-'5, & n (11); V. C. 1873, c. 151, § 1, &c.; Bac. Abr. *Mandamus*, (C) & (D).)

2<sup>c</sup>. Writ of *Quo Warranto*.

A writ of *quo warranto* is in the nature of a writ of right for the Crown or Commonwealth against one who claims or usurps any office, *franchise*, or liberty, in order to enquire by what authority he supports his claim, in order to determine the right. It lies also in case of *non-user*, or long neglect of a franchise, or *mis-user*, or abuse of it; being a writ commanding the defendant to show *by what warrant* he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. If judgment be for the defendant, it is a judicial allowance of the franchise; but in case of judgment for the Crown or Commonwealth, because the party is entitled to no such franchise, or has disused or abused it, the franchise is either seised into the hands of the sovereign power, to be granted out again, or there is merely a judgment of *ouster*, to turn out the party who usurps it. (3 Bl. Com. 262-3; V. C. 1873, c. 61 § 55; Commonwealth v. Birchett, 2 Va. Cas. 51; Commonwealth v. J. River Co. 190; Ang. & A. Corp. 684 & seq.)

#### 8<sup>b</sup>. Dissolution of Corporations.

Any particular member may be disfranchised, as we have seen, or may lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land; or he may relinquish it by his own voluntary act of resignation or transfer. But the body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation. Let us first enquire into the *consequences* of such dissolution, and then consider *the modes* by which it may be brought about. (1 Bl. Com. 484; 2 Kent's Com. 305 & seq.)

W. C.

#### 1<sup>c</sup>. The Consequences of a Dissolution of a Corporation.

Upon the dissolution of a corporation, at common law, the lands and tenements belonging to it revert to the person, or his heirs, who granted them to the corporation, whilst the chattels in *possession* go to the crown, or, with us, to the Commonwealth. (1 Bl. Com. 484.)

Several reasons are given why the lands and tenements of the corporation should *revert* to the grantor—namely, that the law annexes a condition to every such grant, that if the corporation be dissolved, the grantor shall have the land again, because the cause of the grant fails; and also, that the grant is only during the *life of the corporation*; which *may* endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. It seems, however, to be merely the case of a *base or determinable fee*, with which we shall soon become better

acquainted in the second volume. (1 Bl. Com. 484; 2 do. 109; 2 Insts. Com. & Stat. Law, c. vii; *Bolling v. Mayor of Petersburg*, 8 Leigh, 224.)

A further consequence, at common law, of the dissolution of a corporation, is that debts due to it and debts due from it are alike lost, the defunct corporation being incapable either of suing or being sued, and the individual incorporators being neither entitled to claim what is due to the body politic, nor bound for what is due from it; agreeably to the doctrine of the Roman law, "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*" (Dig. Lib. III, 4, 7; 1 Bl. Com. 484; 2 Kent's Com. 307; *Edmunds v. Brown & al*, 1 Lev. 237; *Rider v. Union Factory*, 7 Leigh, 154; *Bank of Alexandria v. Patton*, 1 Rob. 499; *May v. State Bank of N. Car'a*, 2 Rob. 56.)

The common law doctrine in this particular, however, is frequently modified by charter, or by statute, as we shall presently see it has been in Virginia. (2 Kent's Com. 307-'8.)

The embarrassment arising from these common law consequences of the extinction of a corporation may be, and in most instances is, practically obviated by an *assignment*, which the corporation, in anticipation of its end, makes to trustees, of all its property and effects of every sort, upon trust to collect the debts due to the corporation, or to secure them by deed of trust, which is good, notwithstanding the dissolution of the corporation, to sell the property belonging to it, to pay the debts due from it, and to distribute the residue amongst the incorporators. Or the assignment may be to a succeeding corporation, who must pay the debts, and is entitled to recover those due to the predecessor. (Ang. & A Corp. 751; *King v. Jno. Pasmore*, 3 T. R. 241-'2; *Mayor, &c., of Colchester v. Seabor*, 3 Burr. 1866; *Mayor, &c., of Scarborough v. Butler*, 3 Lev. 237; *Rider v. Union Factory*, 7 Leigh, 154; *May v. State Bank of N. Car'a*, 2 Rob. 56; *Bank of Alexandria v. Patton*, 1 Rob. 499; *Barksdale & als v. Finney*, 14 Grat. 338; *Zantzinger v. Gunton*, 19 Wal. 32.)

In Virginia, this result is accomplished in most cases by statute, which enacts that "when any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the pro-

ceeds of its works, property and debts among those entitled thereto." (V. C. 1873, c. 56, § 31.)

A corporation having been dissolved, may be, of course, *revived again* by the charter-making power, or a *new one* may be created with the same name, the same members and officers, the same object and purpose, and the same capacities; but it is very material to distinguish whether it is the one or the other. If it be a *revival* of the old corporation, all the rights and responsibilities thereof are revived with it; whereas, if it be a *new charter* of incorporation, notwithstanding the identity of name and other particulars, none of the rights and obligations of the former attach to it, unless, indeed, it be so provided in the new charter, and the same be accepted. And in order to ascertain whether a *new corporation* is created, or only a former one *revived*, the terms of the charter must be considered, and the legislative intent explored by the established rules of construction. (King v. Pasmore, 3 T. R. 241-'2, 247 to 249. Wyman v. Hallowell & A. Bank, 14 Mass. 58; Hopkins v. Swansea Corp., 4 M. & Welsby, 621; J. Riv. & Ka. Co. v. Early, 13 Grat. 541; Wilson v. Ches. & O. R. Co., 21 Grat. 660, & seq.)

## 2<sup>c</sup>. Modes of Dissolving Corporations.

It will be needful to discriminate here between *public* and *private* corporations, the precise difference between which has been already set forth. (See *Ante* p. 503-'4; J. Riv. & K. Co. v. Early, 13 Grat. 552-'3.)

W. C.

### 1<sup>d</sup>. Modes of dissolving Public Corporations.

The modes of dissolving public corporations are these four, namely: (1), By act of the legislature; (2), By the loss of all its members, or of an integral part of itself by death or otherwise; (3), By the surrender of its franchise to be a corporation; and (4), By forfeiture of its franchise by non-user or misuser. And of these four modes, the last three are identical with those applicable to *private* corporations. The first mode only,—namely, by *act of the legislature*,—presents a material diversity;

W. C.

### 1<sup>e</sup>. Dissolution of Corporations by *Act of Legislature*.

The main distinction, it will be remembered, between public and private corporations is, that over the former the Legislature, as the trustee and guardian of the public interests, has *exclusive and unrestrained control*; and as it may *create* by the exertion of its own will, so it may *modify or destroy* them, as public exigency requires or recommends; whilst the charters of private corporations, on the other hand, are regarded as *contracts*, and, as we have



seen, are protected by that clause of the Constitution of the United States (Art. I, § x. 1) which forbids a State to pass any law *impairing the obligation of contracts*. (Fletcher v. Peck, 5 Cr. 88; Terrett v. Taylor, 9 Cr. 43; Dartmouth Col. v. Woodward, 4 Wheat, 518, 694 & seq; Rich'd, Fred. & Pot. R. R. Co. v. Louisa R. R. Co., 13 How. 71; Yeaton v. Bank of Old Domin'n, 21 Grat. 598-'9; City of Richmond v. Danville R. R. Co., 21 Grat. 604.)

Thus, a *municipal corporation*, such as a city, town, county, township, school district, &c., being public, is subject thus to be dissolved or modified at the discretion of the Legislature. So is any corporation created exclusively for *public purposes*, and endowed even in part with *public funds*, such as the University of Virginia, the Virginia Military Institute, the Board of Education (save in so far as the constitution regulates it), the insane asylums at Staunton, Williamsburg, &c., the Deaf, Dumb and Blind Asylum, &c. The corporation is not *public*, however, where the *design of it is gain*, merely because the government is a shareholder therein, as in case of a bank or internal improvement company. In such case, even though the government owns the *whole stock*, it does not impart to the corporation any of the attributes of its own sovereignty, such as non-liability to be sued, &c., although, being the *sole proprietor*, the government is of course competent to modify or abolish it at pleasure. (Bk. of U. S. v. Planters Bk. of Georgia, 9 Wheat. 907; Bk. of Kentucky v. Wistar & als, 2 Pet. 318; Bk. of U. S. v. McKenzie, 2 Brock. R. 393; Dunningtons v. N. W. Road, 6 Grat. 170-'71; Richm'd v. Danville R. R. Co., 21 Grat. 604. See Sayre v. N. W. T. Pike, 10 Leigh, 454; Boulton v. Crowther, 2 B. & Cr. (9 E. C. L.) 703; Plate Glass Co. v. Meredith, 4 T. R. 794; 8 Cow. 146.)

2°. Dissolution of Corporation by the loss of *all its Members*, or of an *integral part* of itself, by death or otherwise.

By the death of *all its members* a corporation aggregate, other than a *joint-stock company*, is always dissolved. In the case of a *joint-stock company*, the shares are transmitted to the personal representatives of the shareholders, so that the death of the latter does not interrupt the succession. The death of all the members extinguishes the corporation only where the corporators have no separate property therein. And in such cases also the corporation is dissolved when, from death or disfranchisement, so few members remain that by the charter they cannot continue the succession; as in Virginia, where the number in certain corporations is reduced *below five*, or rather where *four-fifths of the stock* becomes the property of less than



five persons. &c. (V. C. 1873, c. 57, § 36): and also where one of several necessary *integral parts* is lost. (Colchester v. Seabor, 3 Burr. 870; S. C. 1 Wm. Bl. 591; Rex v. Pasmore, 3 T. R. 241; Rex v. Miller, 6 T. R. 278; Rex v. Morris, 3 East. 216; Strata Marcella, 9 Co. 25 b; 2 Kent's Com. 309.)

The dissolution of a corporation from the loss of a portion of its members, or of one or more of its *integral parts* (that is, *distinct parts* without *every one* of which the body is incomplete,—e. g., a corporation consisting of *Mayor, Aldermen and commonalty*), results from the incapacity of the body in its imperfect state, either to act, or to restore itself by a new election. Wherever, therefore, the corporation may restore itself, or be restored by a new election or appointment, although until so restored it may be *suspended*, yet it is not *extinguished*. (Com. Dig. Franchise (G. 4); Rex v. Pasmore, 3 T. R. 241, 243; Phillips v. Wickham, 1 Pai. Ch. R. (N. Y.) 596-'7; Slee v. Bloom, 19 Johns. 459.)

This method of dissolution is as applicable to *private* as to *public* corporations, save only that, in the United States especially, it is not *customary* to have even *municipal* corporations, and much less *private ones*, composed of *integral parts*; for where a corporation is designated by such a title as "The President, Directors & Co.," &c., the president and directors are not generally *integral parts*, and their non-existence by no means supposes even the *suspension*, much less the *extinction*, of the body politic (Phillips v. Wickham, 1 Pai. Ch. R. (N. Y.) 590; Russell v. McClellan, 14 Pick. 63.)

### 3°. Dissolution of a Corporation by the Surrender of its *Franchise to be a Corporation*.

The *capacity* of a *municipal* corporation to surrender its corporate existence has been in England much questioned (Ang. & A. Corp. 736, & n 2; Rex v. Amery, 2 T. R. 531, 532); but the better opinion is, that where duly made, the surrender is effectual to dissolve the municipal body. (Rex v. Miller, 6 T. R. 277; Rex v. Hawthorne, 5 B. & Cr (11 E. C. L.) 410; Butler v. Palmer, 1 Salk. 191; Newling v. Francis, 3 T. R. 196-'7; Rex v. Holland, 2 East. 72; Rex v. Osborne, 4 East. 335; 2 Kent's Com. 309, & seq.)

The power of a *private* corporation to make such surrender appears never to have been doubted. (2 Kent's Com. 311; Mumma v. Pot. Co., 8 Pet. 281; Slee v. Bloom, 19 Johns. 456; McLaren v. Pennington, 1 Pai. Ch. R. (N. Y.) 107; Riddle v. Merrimac Locks, 7 Mass. 185; Hampshire v. Franklin, 16 Mass. 86.)

It seems that the *officers* of a corporation cannot dissolve it without the consent of the corporators any more than they can assign its effects, &c., without such assent; and in all cases where the officers, and in many where the majority of corporators are proceeding to act in a manner destructive of the corporation, or perverse of its purposes, a court of equity will intervene at the instance of one or more corporators to prevent the wrong by injunction. (Ang. & A. Corp. 737; Smith v. Smith, 3 Dessaus. (S. C.) 557; Balt. & O. R. R. Co. v. Wheeling, 13 Grat. 40; Stevens v. Davidson, 18 Grat. 819.)

The surrender, in England, is to be made by deed *to the King*; and forasmuch as the Crown can take nothing save by matter of record, the deed avails not until *it is enrolled*. Nor is the surrender effectual *until it is accepted*. The same *principles* are applicable in the United States, but the books do not indicate the mode whereby the surrender is to be made, nor how the acceptance is to be signified. (Butler v. Palmer, 1 Salk. 191; Revere v. Boston Copper Co., 15 Pick. 351; Boston Glass Manf'y v. Langdon, &c., 24 Pick. 49; Ward v. Sea Ins. Co. 7 Pai. Ch. R. (N. Y.) 294; Ang. & A. Corp. 737-'8; 2 Kent's Com. 310-'11.)

Mere *non-user* of its franchises is not *per se* a surrender, nor in general does it justify the inference of a surrender, in the absence of anything in the charter to give it such effect. (University of Md. v. Williams, 9 Gill & Johns. (Md.) 365; Ang. & A. Corp. 739.) Neither does the sale of all the visible and tangible property of the corporation, although accompanied by its insolvency and a neglect to hold meetings and elect officers. (Brinckenhoff v. Brown, 7 Johns. Ch. R. 217; State v. B'k of Md., 6 Gill & Johns. (Md.) 205; Boston Glass Manf. Co. v. Langdon, 24 Pick. 49); nor the sale under execution of part, or the whole, of the company's works, &c.; as, *e.g.*, of a railroad belonging to a railroad corporation (State v. Rives, 5 Ired. (N. C.) 309); nor one or two individuals acquiring the whole of the stock, unless where the number of corporators is limited, as in Virginia, in the case of mining and manufacturing companies it is to the number of five, &c. (Russell v. McLellan, 14 Pick. 63; Oakes v. Hill, Id. 442; Spencer v. Champion, 9 Cow. (N. Y.) 536; Wilde v. Jenkins, 4 Pai. Ch. R.; V. C. 1873, c. 57, § 36); nor in case of a *joint stock company*, where the members have respectively a *separate property interest*, all the members *dying at the same instant of time*, for their respective personal representatives immediately succeed to their several shares (Russell v. McLellan, 14 Pick. 63);

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nor a vote of the majority to dissolve it, and close its concerns, the assignment of its effects to trustees, and giving notice to the executive department of the government that the corporation claims no further interest in its charter, at least so as to avoid its existing engagements or debts. (*Revere v. Boston Copper Co.* 15 Pick. 351; *Campbell v. Miss. Un. B'k*, 6 How. (Miss.) 681.)

On the other hand, an act of the Legislature repealing the act of incorporation (*with the assent* of the corporation), would undoubtedly be a sufficient surrender. (*Riddle v. Proprietors of Locks, &c.*, 7 Mass. 185; *McLaren v. Pennington*, 1 Pai. Ch. R. 107; *Dartm. Col. v. Woodward*, 4 Wheat. 518) And for *some purposes* it is a surrender, if the corporation suffer acts to be done which defeat the end for which it was instituted; *e. g.*, where by statute all debts due by the company at its dissolution are charged on the persons individually who *then compose it*; and the company being indebted, suffer all its property to be sacrificed, omit the periodical elections, and take no step looking to a resumption of the corporate functions: such acts constitute a surrender in order to ascertain *who are personally responsible* for the corporation debts. (*Slee v. Bloom*, 19 Johns. 456; *Penniman v. Briggs*, 1 Hopk. Ch. R. (N. Y.) 300; *S. C.* 8 Cow. 387; 2 Kent's Com. 311-'12.)

4°. Dissolution of Corporation *by Forfeiture*, for *Non-user*, or *Mis-user*, of its Franchises.

Although it was once doubted whether the *being* of a corporation would be forfeited by a misapplication of the powers entrusted to it, it is now well settled that it is a *tacit condition* of a grant of incorporation that the grantees shall act up to the end or design for which they were incorporated; and hence, through neglect or abuse of its franchises, a corporation may forfeit its charter as *for condition broken* (*Rex v. Saunders*, 3 East 119; *Rex v. Amery*, 2 T. R. 515; *Rex v. Pasmore*, 3 T. R. 246; *Terratt v. Taylor*, 9 Cr. 51, 52; *Dartm. Col. v. Woodward*, 4 Wheat. 658-'9; *Com'th v. F. & M. Ins. Co.*, 5 Mass. 230; *People v. Manhattan Co.* 9 Wend. 351; *Ch. Riv. Br. v. Warren Br.* 7 Pick. 371; 1 Bl. Com. 485; *Ang. & A. Corp.* 742.)

The acts, respectively, of neglect, or *non-user*, and of *mis-user*, or abuse, which will be cause of forfeiture, can only be illustrated by a few examples of each. Thus, the omission or refusal of a corporation to set forth the right by which it claims its corporate franchises, when called on in a court of justice so to do (*Rex v. Amery*, 2 T. R. 567); the suspension by a bank of specie payments, when such payments are required by the charter (*Ang.*

& A. Corp. 743); the suspension of business for more than a year, by formal resolution of the board of direction, on the part of a marine insurance company (Ward v. Sea Ins. Co., 7 Pai. Ch. R. 294); the contracting of debts, or issuing of bills by a bank, to a larger amount than the charter allows; embezzling deposits; making large dividends while debts are denied payment; loaning money to its directors contrary to law; or making an assignment of its effects, or being otherwise insolvent (Bank Comm'rs v. Banks of Buffalo, 6 Pai. Ch. R. 497; People v. Hudson B'k, 6 Cow. 217; People v. Niagara B'k, Id. 196; Ang. & A. Corp. 743-'4); non-compliance on the part of a turnpike or railroad company with the requirements of the charter, touching the construction or repairs of the road (People v. Kingston & M. T. Pike Co., 23 Wend. 193; People v. H. & C. T. Pike Co., Id. 254; Ang. & A. Corp. 745-'6; a railroad company suffering its road to be sold on execution, and broken up in whole or in part (Ang. & A. Corp. 745; State v. Rives, 5 Ired. (N. C.) 309); *dis-user* of the corporate franchise for a time such as may be designated by law, *e. g.* in Virginia, dis-user of a ferry for *two years and a half* (Ang. & A. Corp. 745-'6; State v. Rives, 5 Ired. 309; V. C. 1873, c. 64, § 11);—all these are causes of forfeiture of the charter.

In general, the abuse or neglect must be something more than accidental or casual negligence, excess of power, or mistake in its exercise. In order to make a forfeiture, there must be something wrong arising from *wilful abuse, or improper and persistent neglect*. A single act of *abuse or of wilful non-feasance* is a cause of forfeiture, if it be insisted on; but a single act of non-feasance not committed *wilfully or negligently*, nor producing nor tending to produce serious mischief, and not being contrary to the requisitions of the charter, will not work a forfeiture. (Ang. & A. Corp. 745; People v. Bristol & R. T. Pike Road, 23 Wend. 222; Bank Com'rs v. Banks of Buffalo, 6 Pai. Ch. R. 497; Ward v. Sea Ins. Co., 7 do. 294 )

Causes of forfeiture do not operate *per se*, nor can they even be taken advantage of *collaterally or incidentally*, or in any other mode than by a *direct proceeding*, instituted for the purpose, against the corporation, so that it may have an opportunity to answer. And that proceeding can be instituted by *no one but the government which created the corporation*, which, if it thinks fit, may waive the forfeiture, and may do so by *plain implication*, as well as *expressly*, as by subsequent legislative acts recognizing

the continued existence of the corporation, &c., although this doctrine must be taken in subordination to the charter, if that *expressly declares* that any act of *abuse or neglect* shall *ipso facto* operate a forfeiture. (Rex v. Staverton, Yelv. 190 & n (1); King v. Carmarthen, 1 Wm. Bl. 187; S. C. 2 Burr. 869; King v. Amery, 2 T. R. 515; Rex v. Pasmore, 3 T. R. 244; Terrett v. Taylor, 9 Cr. 51; Banks v. Poiteaux, 3 Rand. 142; Soc. for Prop. Gospel v. N. Haven, 8 Wheat. 464, 483-'4; 2 Kent's Com. 312; Ang. & A. Corp. 746 to 748.)

The forfeiture of the charter can be enforced in a *court of law alone*. A court of chancery may hold a corporation to account, as trustee, for abuse of trust, but cannot divest it of its corporate character, unless specially authorized by statute so to do, as in New York it is. (King v. Whitwell, 5 T. R. 85; Atto. Gen. v. Clarendon, 17 Ves. 491; Slee v. Bloom, 5 Johns. Ch. R. 380; 2 Kent's Com. 313-'14.)

The mode of proceeding against a corporation, in order to enforce a forfeiture of its corporate franchise, is either by *scire facias*, or by information in the nature of a *quo warranto*. There seems, however, to be no material diversity in their use; and in Virginia the latter has been more frequently employed. (1 Bl. Com. 485; Rex v. Pasmore, 3 T. R. 244, 245; People v. Bank of Niagara, 6 Cow. 196; People v. Bank of Hudson, Id. 217; Id. 211; V. C. 1873, c. 61, § 55; Com'th v. Birchett, 2 V. Cas. 51; Com'th v. J. River Co. 190; 3 Kent's Com. 313.) See Earl of Rutland's Case, 8 Co. 55 a, where the question as to the *right to an office* was determined upon a writ of *assise of novel disseisin*, as between the two rival claimants.

## 2<sup>d</sup>. Modes of Dissolving Private Corporations.

The modes of dissolving *private corporations* are the same as in the case of *public corporations*, save only as to dissolution *by act of the Legislature*, which in the *United States*, by virtue of the Federal Constitution, is not universally applicable to dissolve *private*, as it is to extinguish *public* corporations.

The charter of a *private corporation* is, as we have seen, a *contract*, and, therefore, to alter or repeal it without the consent or default of the corporators, except where the power to do so is reserved in the charter, or by general statute, is to *impair the obligation of contracts*, which the Constitution of the United States (Art. I, § x, 1,) forbids *any State* to do. This clause of the Constitution had been enforced in Fletcher v. Peck, 6 Cr. 87, against the State of Georgia, which sought to cancel a land-grant which it

had previously made; and in *N. Jersey v. Wilson*, 7 Cr. 164, against the State of New Jersey, which wished to evade an exemption from taxes which it had granted; but the doctrine had not been applied to *corporations* and their charters, until the very noted case of *Terrett & als v. Taylor & als*, 9 Cr. 53 & seq., where the validity of the acts repealing the acts incorporating the Episcopal churches in Virginia, and appropriating their property to public uses, came under the examination of the Supreme Court of the United States, and the acts were pronounced unconstitutional, as *impairing the contracts* contained in those charters. "A private corporation," said C. J. Marshall, in delivering the opinion of the court, "created by the Legislature, may lose its franchises by *mis-user* or a *non-user* of them; and they may be resumed by the government under a judicial judgment, upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as *are inconsistent with the new government* may be abolished. In respect, also, to *public corporations*, which exist only for public purposes—such as counties, towns, cities, &c.—the Legislature may, under proper limitations, have a right to change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was originally purchased. But that the Legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, *without the consent or default* of the corporators, we are not prepared to admit. And we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the *spirit and letter* of the Constitution of the United States, in resisting such a doctrine." But the leading and principal case on the subject is that of *Dartmouth College v. Woodward*, 4 Wheat. 518.

The case of *Dartmouth College v. Woodward* originated in an attempt of the Legislature of New Hampshire to modify, without consent of the corporators, the charter of Dartmouth College, granted in 1769 by the royal authority. In pursuance of certain acts of the Legislature of New Hampshire, of 27th June and 18th December, 1816, changing the charter of the college, which acts had been enacted without the consent of the existing trustees, who



constituted the corporation, one Woodward had obtained possession of the book of records, corporate seal, and other corporate property of the college, and refusing to surrender them upon the demand of the old trustees, they instituted against him an action of trespass on the case in *trover and conversion* to recover the value. The jury found a special verdict, setting forth the origin of the institution; the manner of its endowment (which was exclusively by private persons in New Hampshire and in England); the charter of 1769 granted by the Crown; and the acts of the New Hampshire Legislature of June and December, 1816, proposing to modify the charter, which were without the assent and contrary to the wishes of a majority of the trustees then composing the corporation; and estimating the value of the property withheld by Woodward at \$20,000, submitted to the court the question whether the law was for the plaintiffs or for the defendant. The New Hampshire courts deemed the acts of 1816 valid, and gave judgment, therefore, *for the defendant*; and to that judgment of the Supreme Court of New Hampshire, the trustees, in pursuance of the 25th section of the Judiciary Act of 1789, obtained a writ of error from the Supreme Court of the United States, because there had been drawn in question in the State court the validity of an act of the State Legislature, on the ground of its repugnance to the Constitution of the United States, and the decision of the State court had been *in favor of its validity*. The question was then discussed at great length, and with consummate ability, in the Supreme Court of the United States, by Mr. Webster and Mr. Hopkinson for the college, and Mr. Holmes and Mr. Wirt for Woodward. The judgment of the court was pronounced by Chief-Justice Marshall, with only one dissentient from the conclusion, although Washington and Story, J. J., gave separate opinions, somewhat varying the grounds of decision.

The judgment of the Supreme Court of the United States was,—

1. That the charter granted by the Crown to Dartmouth College in 1769 made it a *private corporation*, and was a *contract* within the meaning of that clause of the Constitution of the United States (Art. I, § x, 1) which declares that no State shall make any law *impairing the obligation of contracts*;

2. That the charter was not dissolved, nor affected by the Revolution; and

3. That the act of the New Hampshire Legislature, altering the charter without the consent of the corporation, in a material particular, was an act impairing the



obligation of the charter, and was *unconstitutional and void*.

The judgment of the Supreme Court of New Hampshire was therefore reversed, and the Supreme Court of the United States, proceeding to give such judgment as the court below ought to have given, it was "considered by the court that the said trustees of Dartmouth College do recover against the said William Woodward the aforesaid sum of twenty thousand dollars, with costs of suit."

These doctrines have ever since been recognized as those which are to govern all cases of *private corporations*; but it has never been considered that they applied to prevent the exercise of the right of *eminent domain* on the part of a State, whereby a corporate franchise may be appropriated, in whole or in part, for public uses, upon providing a *just compensation*. The grant of a franchise is of no higher order, and confers no more sacred title, than the grant of land to an individual; and when the public necessities require it, the one as well as the other may be taken for public purposes, subject only to the condition of making *just compensation*, as in case of the appropriation by the public of other subjects of property. A franchise is property, and is to be protected like other property, neither more nor less. (West. Riv. Br. Co. v. Dix. & al, 6 How. 534, & seq.; Richmond, &c., Rl. Rd. Co. v. Louisa Rl. Rd. Co. 13 How. 83; Stokes v. Upper Appom. Co. 3 Leigh, 337; Tuckahoe Can. Co. v. Tuckahoe Rl. Rd. Co. 11 Leigh, 74-'5, & seq.; James Riv. & K. Co. v. Thompson & al, 3 Grat. 270; Boston Water Pow. Co. v. Worcester Rl. Rd. 23 Pick. 360-'61; 7 Pai. Ch. R. 45; Gov. & Co, &c., v. Meredith, 4 T. R. 794 )

One further question remains to be considered,—viz., whether it is competent to a State to grant a *rival franchise* which shall impair or destroy one previously granted. The New York courts strenuously insisted that it was not; that a franchise once vested, not only could not be divested without consent of the owner, or his default, but that it could not be encroached upon and rendered less valuable *by rivalry*, being deemed in its nature a *monopoly*, whether expressly made such or not. They held all statute-privileges to come within the equity of this principle. No rival road, bridge, ferry, or other similar establishment, they held, could be tolerated so near to one previously subsisting as materially to affect or impair its profits. It operated, they declared, as a *fraud upon the grant*, and went to defeat it. (N. Bingham T. P. Co. v. Miller, 5 Johns. Ch. R. 111; Ogden v. Gibbons, 4 Johns. Ch. R. 160.)

These principles have received little countenance elsewhere, and it is the generally accepted doctrine in this country that no grant of a franchise *is exclusive*, unless it is *plainly declared to be so*. Monopolies and exclusive privileges in the nature of monopolies, are not favored by the common law, nor by the interests of society. A government is *not to be presumed* to design to relinquish or circumscribe its rightful power or control in promoting the advantage of the community, any further than it has plainly and clearly indicated, without the necessity of resorting to remote inference and construction. This reluctance to carry exclusive privileges and public grants beyond their certain import is well illustrated in England in the case of *Stourbridge Can. v. Wheeley & al*, 2 B. & Ad. (22 E. C. L.) 793, and in several cases in the Supreme Court of the United States (*e. g.*, *Jackson v. Lamphire*, 3 Pet. 289; *Beatty v. Lessee of Knowles*, 4 Pet. 168; *Prov. Bank v. Billings & al*, 4 Pet. 514; *U. S. v. Arredondo*, 8 Pet. 738.) And in *Chas. River Bridge v. Warren Free Bridge*, 11 Pet. 544, & seq., it was directly determined by the Supreme Court of the United States, that *no franchise was exclusive unless so ascertained to be by the unmistakable terms of the grant*, therein affirming the opinion previously pronounced in the same case by the Supreme Court of Massachusetts. (7 Pick. 371.) The Supreme Court of the United States reiterates this same doctrine in the case of the *Richmond, &c., R. R. Co. v. Louisa R. R. Co.*, 13 How. 71. And in Virginia it is the firmly established doctrine of the law. (*Stokes v. Upper Appom. Co.* 3 Leigh, 337; *Tuckahoe Can. Co. v. Tuckahoe R. R. Co.*, 11 Leigh, 69; *Trent v. Cartersville Bridge Co.*, 11 Leigh, 521.)

# INDEX.

Abandonment, cause of divorce, 260, 265, 266  
 Abduction, of child, and remedies, 397 to 402  
     of ward, and remedies, 437 to 439  
 Abjuration, of realm, 53, 54  
 Abolition, of slavery, in Va. & U. States, 172-'3  
     of slave-trade by Va. (1778), 164  
     by Gr. Britain (1806), 176  
     by U. States (1808), 175  
 Absolute rights, and duties, nature of, 52  
     several sorts, 52 to 59. See *Rights, Duties.*  
     personal security, 52, 55  
     security of life and limbs, 52  
     security of body and health, 54-'5  
     security of reputation, 55  
     personal liberty, 55 to 59  
     private property, 59  
     freedom of conscience, 59, 60  
     solemn declarations and guards of, 60 to 67  
     in England, 60 to 62  
     in Virginia, 62 to 67  
 Abstracts, written as modes of study, 21  
 Access, of husband, when presumed, 411  
 Account of sales by guardians, 452  
 Accounts, to be rendered by agents, 200  
     stated by infants, 485  
     of guardians, 444 to 470  
     general doctrine of, as to guardians, 444-'5  
     particulars, 445 to 450  
     ward's estate in hand, 445-'6  
     losses by guardian's neglect, 446 to 449  
     losses by co-guardian's default, 449-'50  
     means to compel prompt and accurate settlement, 450 to 454  
     commissioner of accounts, 451  
     inventory and account of sales, 452  
     annual settlement, 452 to 454  
     mode of stating, 454 to 470  
     general principles, 454-'5  
     modes of charging interest, 455  
     allowances to guardian, 456 to 460

Accounts—  
     disbursements, 456-'7  
     compensation, 457 to 460  
     guardian's private settlement, 461  
     guardian's own examination, 461-'2  
     production of books and vouchers, 462  
     proceedings by ward, and limitations thereto, 463  
     form of stating, 464 to 470  
 Accountability of guardians, 444 to 450  
 Act of legislature, see *Statute.*  
 Act of parliament, see *Parliament.*  
 Act of settlement, 60, 61  
 Actions, by and against husband and wife, 347 to 364  
     by husband and wife, 347 to 357  
     husband and wife join, 347-'8  
     husband sues alone, 348 to 351  
     husband and wife may join or not, 351 to 353  
     wife may sue alone, 353 to 354  
     when husband or wife dies, 354 to 357  
     consequences of mistake in parties, 357  
     against husband and wife, 357 to 364  
     husband and wife to be joined, 358-'9  
     husband to be sued alone, 359-'60  
     husband and wife to be joined or not, 360  
     wife to be sued alone, 361  
     when husband or wife dies, 361-'2  
     consequences of mistake in parties, 362-'3  
     suits in equity between husband and wife, 363 to 365  
     See *Husband & Wife.*  
     by and against agents, 216, 224 to 226  
     by and against corporations, 555 to 570  
     by corporations, 555 to 557  
     causes, forms of action, modes of suing, 555 to 557  
     foreign corporations, 557, 541  
     in U. States courts, 557  
     against corporations, 557 to 570

## Actions—

contracts, 558 ; torts, 5.  
 foreign corporations, 56  
 mode of proceeding by  
 corporations, 562 to 570  
*See Corporations.*  
 by and against infants, 478  
*See Infants.*

Accusation, cause and nature  
 able, 63-'4

self, not compellable, 63-'4

Adjournment of parliament, 7

Ad litem, guardians, 472-'3, 4

Administrator, husband of wife

Admiralty courts, laws used in

Ad quod damnum, substitute  
 118

Adultery, divorce for, 255-'6,  
 not permitted by deeds of se  
 289

Advowsons, 151

Affinity, bar to marriage, 235,  
 cause of divorce, 258, 262

African slave-trade, *see Slave-*

Africans, naturalization of, 131

Age, of consent to marriage, 2

want of, effect on marriage  
 241-'2

want of, cause of divorce, 2,

of infants, for divers purposes

full, for all purposes, 472

precise time of attaining, 47

Agency, *see Principal & Agent*

Agent, liability of for money  
 198-'9

for money received, 198, 199

for depreciated currency, 19

measure of knowledge, skill

dence required, 199

unlawful appropriation of

goods, 199

rendering accounts, 200

dealing for his own benefit

ject, 222 '3

how strangers affected by reli

to 223

*See Master & Servant.*

mutual defence and mainte

nuis, 201

seducing away servants, an

them, 201

contracts by agent, 202 to

delegation of authority, 21

torts by agent, 218 to 222

grounds and limits of ma

bility for, 218

liability of, on contracts as ag

to 216

contract in agent's own i

to 214

government agent, 212-

private agent, 213-'14

no principal disclosed, 214

authority exceeded, 215-'1

foreign principal, 216

## Alienation—

- by husband to wife, and *vice versa*, 291 to 295, 319 to 321
- by wife before marriage, in fraud of husband, 298
- of wife's separate property, 319 to 326
  - restrictions upon, 327 to 331
- by wife to stranger, 338 to 341
- to wife, 341
- by infants, 477, 487, 494
- by corporations, 552
  - restraints upon, 552
- Alimony, 269, 278, 281 to 283
- Allowances to guardians, 456 to 462
- Amalfi, discovery of Pandects at, 11, 36
- Ambassadors, prerogative of king to send, 81
  - inviolability of, 81
- Amotion, of public officers, causes and modes, 93
  - officers of corporations, 527
- Answer, of corporations in chancery, 569-'70
- Ante-nati*, 147
- Ante-nuptial contracts of wife, 302, 335-'6, 484
  - conveyances of wife, 298
- Anticipation, of income of wife's separate estate, 327 to 329
  - of joint-income, of family, restrained, 329-'30
- Annual parliaments, 74
- Annus luctus*, of widow, 410
- Appearance, of infant, in court by guardian *ad litem*, or next friend, 432-'3, 473 to 475
  - error cured by Statute of *Jeofails*, when, 432-'3, 475
- Appointment of court, guardians by, 427 to 429
- Apportionment, of hires of servant, 170
- Apprehension of bodily hurt, cause of divorce, 259-'60
- Apprentices, who, and why so called, 180
  - mode of binding, 180 to 183
    - instrument of contract, 180-'81
    - proper parties, 181 to 182
    - terms, 182-'3
  - obligation of master, apprentice, and parent, respectively, 183 to 185
  - liability of apprentice to action, 184, 482-'3
  - master's right to apprentice's earnings, 185
  - authority of master, 185-'6
  - assignment of contract, 186
  - adjustment of differences between master and, 186-'7
  - penalty for enticing or harboring apprentice, 187
  - dissolution of contract, 187-'8
- Archbishops, 48, 148-'9
- Archbishoprics, 48. See *Provinces*.
- Archdeacons, 48, 150
- Archdeaconry, 48

- Aristocracy, characteristics of, 27
  - in government of England, 27
  - of American States, 27
- Arms, right to have for defence, 62, 67
- Armies, standing, dangerous, 66, 156
- Artificers, 155
- Artificial persons, or corporations, 497
  - See *Corporations*.
- Assault and battery, by and on corporations, 570
- Assent to marriage, age of party for, 237, 241, 247, 262, 471
  - of parent or guardian, 244
- Assessment, on shares in corporation, 530-'31
- Assignment, of contract of apprenticeship, 186
  - wardship, 425-'6, 430-'31
- Assize, of novel disseisin for office, 584
- Attainder, bills of, prohibited, 63
- Attorney, appearance of infants by, 474-'5
  - power of by infant, void, 485-'6
- Auctioneer, as agent, 204
- Authorities, to determine the law, 31 to 32
- Authority, of master over apprentice, 185
  - master over servant, 194
  - of agent, express or implied, 203 to 206
  - agent, extent of, 206 to 209
    - joint and several, general or special to be pursued, 207 to 209
  - delegation of, 209
  - contracts in pursuance of, 209 to 216
  - grounds and limits of liability, in case of torts, 218 to 221
  - termination of, 223 to 227
  - revocable generally, and exceptions, 223-'4
  - of husband over wife, 285-'6
  - of parent over child, 397 to 400
  - given by infant, void, 485-'6
- Avoidance, of contracts by infants, 487 to 488, 492 to 495
  - of torts, by infants, not allowed, 495 to 497
- Bachelor, knight, 155
- Bail, excessive, prohibited, 63, 64
- Bailiffs, of hundreds, 100
  - special, 100
  - private, 188
- Banishment, 54
- Bank-directors, authority of, 546
- Banking corporations, power of States to create, 510
  - currency, not be issued by city, 539-'40
  - foreign in Virginia, 540
  - See *Banks*.
- Bankruptcy, of principal, revokes agency, 226
- Banks, liability of agent, &c., for deposits in, 198-'9
  - foreign, not to operate in Virginia, 540

- Banks—**  
 liens on shares, for debts to, 554  
 See *Banking corporations*.  
**Banna, of marriage**, 238, 243  
**Banneret, knight**, 155  
**Bargain and sale, corporations convey-**  
 ing by, 550  
**Baron**, 154  
**Baron and feme**, 230. See *Husband and*  
*Wife*.  
**Baronet**, 155  
**Bastards, provisions for support**, 128  
 legitimated by subsequent marriage,  
 &c., 374  
 mother, natural guardian, 398  
 definition of, 408-'9  
 duty of parents to, 412 to 416  
 compelling fathers to support, 412  
 to 416  
 custody of, 416  
 rights of, at common law, 416 to 419  
 parish settlement of, 419  
 incapacities of, at common law,  
 419-'20  
 rights and privileges of, in Virginia,  
 420 to 421  
**Bath, knight of the**, 155  
**Beggars**, 127  
**Benefit of clergy**, 368-'9  
**Berwick**, 45  
**Betrothal, age for**, 471  
**Bills, as currency, not by city**, 540  
 not by foreign banks, 540  
**Bill in chancery, for abduction of in-**  
 fants, 402, 439  
**Bill of rights**, 61, 62-'3  
**Billeting of soldiers**, 61  
**Bishops**, 149  
**Bishoprics**, 48  
**Board, of supervisors**, 133, 124  
 school tax, 394  
 of education, composition and powers,  
 390, 395  
 public corporation, 503  
 county school, 392, 503  
 bank directors, 528-'9, 542, 546  
 directors, of corporations, 542, 543,  
 554, 565-'6  
**Body, security of**, 54, 61 to 64  
 corporate or politic, 497  
**Bonds, official**, 93-'4, to 130  
 sheriff, 93-'4; deputy sheriff, 96  
 coroner, 102; constable, 111  
 surveyor of road, 105; overseers of  
 poor, 123  
 escheator, 130  
 officers of corporations, 547  
**Boroughs**, 49  
**Borough's elder**, 49, 110  
**Borough-English, custom of**, 83  
**Borsholder, or borough's elder**, 49, 110  
**Bracton**, 32  
**Breach, of promise of marriage**, 251  
 defences to action for, 251 to 253  
 damages for, 253  
**Bridges, erection of public**, 119  
**Brocage, marriage**, 231-'2  
**Brooke's abridgment**, 32  
**Butlerage**, 88  
**By-laws, power of corporations to make**,  
 522, 553 to 555  
 mode of enacting, 553  
 to be fair and reasonable, 553-'4  
 for transfer of shares, 554  
 enforced by penalties, 554-'5  
**Cambridge**. See *Universities*.  
**Canon law**, 37  
 in what courts used, 37  
 in what causes in Virginia, 37  
**Canons, or prebendaries**, 150  
**Canonical impediments to marriage**, 232  
 to 237, 239-'40, 258  
 why so called, 232, 258  
 classes of, 233 to 236  
 pre-contract, 233-'4, 239, 258  
 consanguinity, 234-'5, 240, 258  
 affinity, 235, 240, 258  
 incurable impotency of body, 236,  
 240, 262  
 effect of canonical impedimenta,  
 236-'7  
 in respect of divorce, 236, 258  
 in respect of legitimacy of issue,  
 236-'7, 2-8  
**Case, action of against agent**, 225-'6  
**Cashier, of bank, power of**, 546  
 process served on, 565-'6  
**Causeways, construction of**, 119  
**Celebrant, of marriage**, 245-'6  
**Chancery**. See *Equity*.  
 ward in, 428-'9  
**Change of guardian, not approved**, 435  
**Chapter, of cathedral**, 148 to 150  
**Charter-governments of English colo-**  
 nies, 47-'8  
**Charter, great, of England**, 55, 60, 62  
 of corporations, grant of, 508 to 511  
 acceptance of, 520-'21  
 a contract, how and when modified,  
 503, 535, 578-'9, 584 to 587  
 new or old, difference in effect, 578  
**Chattels, real of wife**, 302 to 304 •  
 personal of wife, in possession, 299 to  
 308  
*choses in action* of wife, 304 to 310  
 reversionary, of wife, 310-'11  
 will of, age for making, 471  
 right of corporation to acquire, 547,  
 548-'9, 551  
 of corporations, at dissolution, 552  
**Chester, county palatine**, 50  
**Children**. See *Parent & Child, Infants,*  
*Bastards*.  
 paupers, provision for, 128  
 custody of, in case of divorce, 269  
 effect of nullity of marriage, or divorce  
 on legitimacy, 237, 258, 239, 259,  
 272-'3, 275  
 custody of, by deeds of separation, 239  
 legitimate, who are, 374

**Children—**

- duties of parents to, 375 to 396
  - maintenance, 375 to 380
    - by *father*, 375 to 379
    - allowance out of child's estate, 378
  - dis-inheriting, 379
  - after-born, effect on will, 379-'80
- protection, 380
- education, 381 to 396. See *Education*.
- power of parents over, 396 to 405
  - custody, and correction, 396 to 403
  - remedies for abduction, 400 to 402
  - consent to marriage, 244-'5, 243, 245-'6, 247, 402-'3
  - care of estate of, 403-'4
  - parent's delegation of power, 404-'5
  - termination of parent's authority, 405
- duties of to parents, 405
- illegitimate, or bastards, 405 to 421
  - who are, 405 to 411
    - bastards born out of wedlock, 407 to 411
    - bastards born in wedlock, 411
  - duties of parents to bastards, 412 to 416
  - father compelled to support, 412 to 416
  - custody of, 416
  - rights and incapacities of bastards, 416 to 421
    - at common law, 416 to 420
    - in Virginia, 420 to 422
  - meaning of term *child*, &c., in gifts, 417 to 419, 421
- Chivalry, guardians in, 424-'5
- Choosing guardian, mode of, 426-'7
  - age for, 471
- Choses in action*, husband's interest in
  - wife's, 304 to 310
  - wife's equity in, 306 to 310
- Church, in Virginia, before revolution, 502
  - glebes sequestered, 502
- Church-wardens, 121, 152
- Circuit courts, corporations created by, 509-'10
  - jurisdiction of divorces, &c., 266 to 270, 279, 281, 283-'4
- Cities, 49
  - counties corporate, 50
  - not to issue currency, in Virginia, 539-'40
- Citizens, who are in England, 137-'8
  - who are in Virginia, 138-'9
  - naturalized in England, 138
  - naturalized in Virginia, 139 to 141
- Civil corporations, nature of, 504-'5
  - advantages of, 505
  - limited partnerships, 506-'7
- Civil divisions, of England, 49, 50
- Civil law, 35 to 37
  - in what courts used, 37
  - in what cases in Virginia, 37

- Civil liberty, 52
- Civil list, of England, 90
- Civil rights, 63 to 65, 66-'7
  - and political equal, 66
  - difference between the sexes, as to, 369 to 373
  - act, in case of bastardy, 413-'14
- Civil state, who compose in England, 158 to 155
- Clementine constitutions, 36
- Clergy, averse to common law, 10 to 13
  - devotion to civil law, 12, 13
  - of England, 148 to 152
  - benefit of, 368, 369
- Clerks, parish, in England, 152
  - of county, &c. courts issue marriage licenses in Virginia, 245
- Code, of Justinian, 35-'6
  - codes, revisals of, how construed, 41
- Co-guardian, losses from misconduct, 449-'50
- Coke, institutes, 32
  - reports, 32
- Collative advowsons, 151
- Collegia*, in Roman law, 500
- Colleges, in Roman law, 500
  - nature of in English universities, 508
  - nature of in U. States, 508
- Colonies, and plantations, laws of, 47
- Colored persons, who are, 179, 242. See *Negro*.
- Comitatus*, *posse*, 100
- Commerce, king the arbiter of, 83
- Commission of array in England, 157
  - of lunacy, 86
  - justice of peace, 105-'6
- Commissioners, of monthly courts in Virginia, 106
  - of roads, election, 114
  - functions, 117, 118, 119-'20
  - to assess damages for roads, 118
  - to contract for bridges, 119
  - of accounts, 451 to 454
  - appointment, 451
  - duties, 451 to 454
    - require inventory and account of sales of fiduciaries, 451
    - require annual settlements, 451 to 454
  - proceedings to enforce duties, 451 to 454
- Commissions, guardian's, 457 to 460
  - amount allowed guardian, 457-'8
  - forfeiture by guardian, 458-'9
  - on what estimated, 459-'60
- Commonalty, who compose the, 154-'5
- Common law, what, 30
  - rise and original, 30, 31
  - parts of, 30 to 37
  - subjects to which it relates, 31
  - depositories of, 31, 32
  - what is in Virginia, 43
- Common placing, mode of study, 21
- Commons, House of, members, 70
  - elections of members, 70 to 72





**Conveyances—**

infants, voidable, 486 to 488  
 infants, confirmation, 488 to 495  
 infants, consequences of avoidance,  
 493 to 495

corporations, preferring creditors, 541

**Convocation, 149 •**

copies of statutes, how authenticated,  
 39

**Copyhold, customs, 33****Coronation-oath, 78, 135****Coroner, antiquity and original, 100, 101**

appointment and removal, 101-'2

securing fidelity of, 102

duties and powers of, 102 to 105

judicial, 102, 103

ministerial, 103-'4

assistants of, 105

**Coronatore, de eligendo et exonerando, 101****Corporate counties, 50****Corporation courts, see County Courts.**

jurisdiction of divorce, &c., 266 to  
 270, 278-'9, 281 to 284

**Corporate meetings, 528-'9, 531, &c.**

See *Corporation*.

**Corporate names, 511 to 514. See Corporations.****Corporations, reasons for and uses,  
 497-'8**

origin and nature of, 498 to 501

several kinds, 501 to 508

aggregate and sole, 501-'2

public and private, 502 to 504

ecclesiastical, 504

lay, 504 to 508

civil, 504 to 507

nature of, 504-'5

advantages, 505-'6

limited partnerships, 506-'7

eleemosynary, 508

creation and organization, 508 to 531

creation, 508 to 520

creation in England, 508-'9

by whom, 508-'9

words of creation, 509

creation in Virginia, 509 to 511

by legislature, 509-'10

by circuit courts, 510

concurrence of several States

in creating, 519

circumstances which attend cre-

ation, 511 to 520

persons to be incorporated,  
 511

name, therefore, to be ob-  
 served, 511 to 514

place, 514 to 520

imposition of taxes, 514 to  
 517

tax on franchise, 515

tax on federal corpora-  
 tions, and *vice versa*,

516-'17

exemptions from taxes,  
 517

**Corporations--**

conduct of business, 517 •  
 to 519

citizenship, 519-'20

suing and being sued,  
 519-'20

in federal courts, 519

in State courts, 520

organization of, 520 to 521

acceptance of charter thereof,  
 520-'21

attributes or incidents at common  
 law, 521 to 523

admission of members and officers,  
 523 to 525

admission of members, 523

election of officers, 523 to 525

disfranchisement of members and

motion of officers, 525 to 527

subscription for and assessment on  
 shares, 527 to 531

modes of action, and powers of corpo-  
 rations, 531 to 572

modes of action, 531 to 534

in meetings, with notice, time,  
 and place, 532

persons composing, 532-'3

powers of, 534 to 572

perpetual succession, 534-'5

common seal, 535 to 537

contract and be contracted with,  
 537 to 547

mode of contracting, 535-'6,  
 537-'8

with whom, by what name, &c.  
 538

what contracts, 538 to 541

agent and agency, 541 to 547

take, hold and transmit property,  
 547 to 552

*mortmain* policy, 547 to 548

not limited to *habitat*, 549-'50

by way of trust, 550

chattels, 548-'9, 551

grants to corporations, 552

consequences of dissolution,  
 552

make by-laws, 553 to 555

sue and be sued, 555 to 570

capacity to sue and be sued,  
 555 to 562

proceeding in suits, 562 to 570

proceeding where corporation  
 is plaintiff, 562 to 564

place of suit, 564

process, 564-'5

mode of serving process, 565  
 to 568

proceedings after process,  
 568 to 570

remove members and officers, 570

disabilities of, 570 to 573

appear *in person*, 571

sue or be sued for certain torts,  
 558-'9, 571

**Corporations—**

- commit treason or felony, 571
- suffer corporeal punishment, &c., 571
- be executor or administrator, 571-'2
- stand seised to use or trust, 622
- be imprisoned, 572
- be outlawed, excommunicated, 572
- relation of members to body, 572-'3
- visitation of, 573 to 575
- judicial proceedings to control, 575-'6
- mandamus, 575
- quo warranto, 576
- dissolution of, 576 to 588
  - consequences of dissolution as to property and debts, 576 to 578
  - modes of dissolving, 578 to 588
- Corporators, witnesses, 568-'9
  - liability for contracts and torts of body, 505-'6, 572-'3
  - transfer of stock, 526, 554, 573
  - subscription for shares, 528 to 531
- Corpus juris civilis*, 35-'6
- Corpus juris canonici*, 36-'7
- Correction, apprentice by master, 185
  - servant by master, 194
  - wife by husband, 285-'6
  - child by parent, 397; by tutor, 404
- Councils, of crown, 76 to 78
- Coupons, and coupon bonds of corporations, 539-'40
- Counties, or shires, 49, 50
  - ordinary, and palatine, 50
  - corporate, 50
- Counts, or earls, 49, 154
- Counts, in declarations against infants, 486
- County courts, jurisdiction of roads, 117 to 119
  - jurisdiction of bridges, &c., 119
  - apprentices, 186 to 188
  - paupers, 124 to 128
  - bastards and pauper children, 128
- County roads, 117
- County bridges, 119
- Courts, King may erect, 82
  - county, see *County courts*.
  - circuit, see *Circuit courts*.
  - corporation, see *Corporation courts*.
  - privy council, &c., 77-'8
- Coust, coustum, coutum*, 88
- Coustumier, le grand*, 46
- Coverture, 280 to 373. See *Husband & Wife, and Wife*.
- Creation, of corporations, 508 to 520
  - of corporations, words of, 509
  - circumstances accompanying, 511 to 520
  - lawful authority, 511.
  - persons, 511
  - name, 511 to 514

**Creation—**

- place, 514 to 520
- Creditors, of corporation, preferences, 541
- Crime, liability of wife for, 364 to 366
  - difference between sexes as to, 367 to 369
  - age of responsibility for, 471
  - of corporations, 570-'71
  - See *Corporations*.
- Criminal conversation. See *Adultery*.
- Criminal liability, of sheriff for jailor, 99
  - master for servant, 220
- Crimination, self, not compellable, 63, 64
- Croke's reports, 32
- Crown, title to, 74. See *King*.
- councils of, 76 to 78
- prerogatives of, 78 to 83
- revenue, 83 to 90
- Cruelty, divorce for, 256-'7, 259
- Curate, 152
- Curator, 422, 434
- Currency, not to be issued by cities, 539-'40
  - depreciated, agent receiving, 198-'9
- Curtesy, in wife's lands, 311 to 313
- Custodes pacis*, 105
- Custodia terræ et hæredis*, writ of, 438
- Custody, of idiots and lunatics, 85-'6
  - infant child, 269, 289, 397 to 402, 416
  - ward by guardian, 478 to 482, 436 to 439
- Customs, general, 31
  - of particular places, 33 to 35
  - instances, 33
  - requirements, and allowance, 33, 34
  - in Virginia, 34-'5
  - contrasted with prescription, 34-'5
  - guardian by, 431-'2
- Custom, duty or tax, 87, 88
- Custuma*, 88
- Danelage*, 31
- Death, civil, 53-'4, 337-'8
  - natural, value set on life, 54
  - protection to life by *magna charta*, 54
  - revocation of agent's authority, 224 to 226
  - of king, effect on parliament, 74
  - by violence, coroner's inquest, 103-'4
  - dissolves marriage, 253
  - guardian's terminates wardship, 471
  - corporators, effect on corporation, 579-80
- Dean, rural, 48, 151
- Dean and Chapter, 149-'50
- Debt, by State of Virginia, prohibited, 65
  - national, of England, 90
  - of corporation, as to corporators, 572-'3, 505-'6
  - to or from corporation dissolved, 577
  - See *Choses in Action*.

- Deceit, master's liability for servant's, 219
- Declarations and guards of rights, 60 to 67  
See *Absolute Rights*.
- Declaratory, statutes, 39  
part of law, 28
- Decretalia Gregorii*, 36
- Decretum Gratiani*, 36
- Dedication, highways to public, 120
- Deed, of corporations, how made, 536-'7  
how acknowledged for registry, 537  
trust by corporation preferring creditors, 541
- De facto* government, 134
- Defence of person, master and servant, 200, 201  
parent and child, 381
- Delegatus non potest delegare*, 209, 542
- Demise of crown, 81
- Democracy, characteristics of, 27  
in English and American governments, 27
- Denizens, who are, 137
- Deodands*, 85
- Depositories, of canon law, 31-'7  
civil and canon laws, 35 to 37
- Deprivation, of clergy in England, 149-'50
- Deputies to sheriffs, 97 to 100  
to coroners, 105
- Descent of crown, 75  
of lands of bastards, 420
- Desertion, cause of divorce, 260, 265
- Digest, of Justinian, 35-'6  
English law, 30, 31, 32
- Dignity, of king, 79 to 81
- Dioceses, 48 to 149
- Directory, part of law, 28  
provisions in statutes, 243, 524, 544
- Direct prerogatives, of crown, 79 to 83
- Disabilities, for marriage, 237 to 242  
classes of, at common law, 237-'8  
effect of, at common law, 239  
as to marriage and issue, 239  
as to divorce, 259  
classes of in Virginia, 241-'2  
of infants, 473 to 497  
as to suits, 473 to 476  
suing and being sued, 474-'5  
staying proceedings, 475  
effect of judicial proceedings as to infants, 475-'6  
as to property and contracts, 476 to 497  
disposition of property, 477  
contracts executory, 477 to 497  
See *Infants*.
- Disbursements, what allowed to guardians, 456-'7  
vouchers for, 456-'7
- Discord,
- Disfranchisement, of corporators, 525-'6
- Disinheriting, of children, 379
- Dis-membering, of slaves, 191
- Dismissal, of servant, effect on wages, 192
- Dissolution, of parliament, 73-'4  
marriage, 253 to 280. See *Divorce*.  
corporations, 555 to 588  
effect as to lands, chattels and debts, 552, 576-'7  
modes of, 578 to 588
- Distress, to compel corporations to appear, 565, 570
- Distribution, wife's share of husband's chattels, 313 to 315  
effect of husband's will, 314  
husband's share of wife's chattels, 305
- Distringas*, to compel corporations to appear, 570
- Divorce, effect of canonical impediments 236-'7  
effect of legal disabilities, 239  
several kinds of, 254 to 266  
*a mensa*, causes in England, 254 to 257  
causes in Virginia, 259 to 261  
*a vinculo*, causes in England, 257 to 259  
causes in Virginia, 261 to 266  
courts charged with cognizance of, 266-'7  
modes of proceeding in, 267-'8  
powers of court, 269-'70  
legislature prohibited to grant, 270 to 271  
effect of in England, 271 to 274  
effect of in Virginia, 274 to 278  
capacities and incapacities of parties, 271, 275,  
legitimacy of issue, 272, 275  
estates of parties, 273-'4, 276  
foreign, 279 to 280  
alimony incident to, 293, 297 to 299, 269, 278, 280 to 283
- Dome-book, of Alfred, 30
- Domicil, for divorces, 279-'80  
of husband and wife, 279-'80. See *Lex domicilii*, and *Residence*.
- Donatio mortis causa*, husband and wife, 295, 320-'21
- Donative advowsons, 151
- Dowager, queen, 76
- Dower, of wife in husband's lands, 315-'16  
age for, 471  
assignment by infant, 483
- Drunkenness, in officers, 93
- Duelling, forfeits office, 93, 94
- Duke, 153
- Duress, *per minas*, 53  
of imprisonment, 58
- Durham, county palatine, 50
- Duties, and rights, 51  
of king, 78  
of taxes on goods, 87 to 90  
of sheriff, 94 to 96  
judicial, 94-'5, 96  
ministerial, 95, 96

**Duties—**

coroner, 102 to 105  
 judicial, 102, 103, 104  
 ministerial, 103, 105  
 justice of the peace, 108 to 109  
 constable, 112  
 surveyor of highways, 115 to 117  
 overseer of poor, 123 to 128  
 escheator, 130 to 133  
 in relation of people, 134  
 husband and wife mutually, 284-'5  
 parents to legitimate children, 374 to 396  
 children to parents, 405 to 407  
 parents to bastard child, 412 to 416  
 support by father, 412 to 416  
 custody, 416  
 guardians, 436 to 444  
 Dyer's reports, 32  
 Earl, 49, 153  
 East Indies, British possessions, 47  
 Ecclesiastical, divisions of England, 48  
 courts which adopt civil and canon laws, 37  
 courts, guardians by, 427 to 429  
 courts, jurisdiction of divorces, &c., 258, 259, 266-'7, 283-'4  
 corporations, what are, 504  
 visitation of, 574  
 Education, of children, duty of parents, 381  
 duty and interest of State as to primary, 381 to 387  
 advantages of general, 382 to 384  
 tends to preserve peace and order, 382  
 tends to improve political society, 382  
 promotes physical comfort and material prosperity, 383  
 augments production and value of lands, 383  
 modes, of effecting general, 384 to 385  
 duty of State as to colleges, &c., 385-'6  
 compulsory, 386-'7  
 history of efforts in Virginia, 387 to 390  
 system in Virginia, 390 to 396  
 organization of system, 390 to 393  
 board of education, 390, 395  
 superintendent of public instruction, 391  
 county school-board, 392  
 county superintendent of schools, 391  
 district school trustees, 392  
 funds for its support, 393-'4  
 regulations for its government, 394 to 396  
 legislature has power of compulsory education, 394  
 duty to establish normal schools, 394-'5  
 power to establish other grades, 395  
 city and county accountable for destruction of school property, 395

**Education—**

school officers to have no pecuniary interest in books, &c., 395  
 what teachers employed, 395  
 teachers' meetings, 395  
 school-houses and appliances, 395  
 public schools free, 396  
 regulations by board of education, 396  
 system for cities and towns, 396  
 ancient seminaries, 500, 501  
 Edward the Confessor, code, 31  
*restitutio legum Angliæ*, 31  
 Elections, to parliament, 70 to 72  
 succession to the throne by, 75  
 of Arch-bishops, bishops, &c., 148 to 152  
 for slave to be free, 168  
 guardian by, 426-'7  
 powers and duties, 433-'4  
 bond and security, 434  
 Eleemosynary corporations, what, 508  
 visitation of, 574-'5  
 Ely, Isle of, 50  
 Emancipation, of slaves in Virginia, 167 to 169  
 general in Virginia, and United States, 172  
 effect on bonds for purchase of slaves, 173-'4  
 Eminent domain, as to charters of corporations, 503, 535, 587  
 Employer, liability for acts and default of contractor, 229-'30  
 Enemies, alien, 143, 145  
 England, countries subject to *authority* of, 45 to 48  
 territory, subject to laws of, 48 to 50  
 ecclesiastical divisions, 48  
 civil divisions, 49, 50  
 Enlarging statutes, 39  
 Enlistment, contracts by infants, 484  
 Entireties, tenants by, 333-'4  
*En ventre sa mere*, 52, 409  
*Equites aurati*, 155  
 Equity, natural, 29  
 technical, 29, 30  
 wife's, in her equitable choses in action, 306 to 310  
 wife's separate property, 316 to 383  
 suits in, between husband and wife, 363 to 365  
 power to remove children from parents, 399, 400  
 power to appoint and control guardians, 428, 429  
 power to restore infants to right custody, 402, 439  
 Escapes, liability of jailor for, 99  
 Escheats, 85, 130 to 133  
 Escheators, 128 to 133  
 antiquity and original, 128-'9  
 appointment and removal, 130  
 fidelity secured, 130  
 duties of, 131 to 133

**Escheators—**

- what lands exempt, 131
- proceedings to escheat, 131 to 133
- notice and inquest, 131-'2
- verdict, 132
- redress to persons aggrieved, 132, 133

Esquire, 155

Estate. See *Property*.

Estimated profits, interest on, by guardians, 455

Estrays, 85

Excise, duties, 89

Executive, power, 74-'5

Executor. age for acting as, 471

corporation, 570, 571

Exile, 59

Expatriation, doctrine at common law, 135

doctrine in Virginia, 185-'6

effect as to United States, 136

Exports, and imports, duties on by States, 65

duty on by United States, 65

*Ex post facto* laws, what are, 24

prohibition of, 62, 63

*Extravagantes*, in canon law, 86Factors, 188. See *Master and Servant*.

Family, royal, 75-'6

Father, obligation to support infant child, 375 to 378

right to infant child's wages, 376, 399, 400

power to delegate authority, 404-'5

appointment of guardian by, 430, 431, 404-'5

guardian by nature, 423-'4, 434

right to custody of infant child's person, and remedies, 397 to 402, 434

Felony, conviction of, cause of amotion from office, 93

Fellow-servant, torts by, master's liability, 196-'7, 220, 221

*Feme covert*, origin of term, 230-'31See *Husband & Wife*, and *Wife*.*Feme sole*, when married woman may act as, 337-'8, 353-'4, 361

Feudal wardships, 424 to 426

chivalry, 424-'5

socage, 425-'6

Fifteenths, 86

*Filius nullius*, 416, 421*Filius populi*, 416

Fines, excessive prohibited, 63, 64

Fish, royal, 84

Fitzherbert's Abridgment, 32

Fleta, 32

Flotsam, 85

*Folk-righte*, 31

Force, cause of divorce, 263-'4

Foreign corporation, contracts by, 517 to 519, 540, 541, 549-'50

Foreign divorces, 279, 280

Foreign marriages, 247 to 249

Foresight, knowledge and judgment in agent, 199

Forest, royal, 84

Forfeiture, infant's contract involving, 485

franchises of corporations, 582 to 584

requires judicial sentence, 483-'4

enforced only in court of law, 584

Fortescue, reason for omission of law-study at Oxford and Cambridge, 17, 18

Founder, of corporation, 574, 575

Franchises, of corporations, 498

*mis-user* and *non-user*, 576, 582 to 585

subject to eminent domain, 587

rival when admissible, 587-'8

Fraud, master's liability for servant's, 219

cause of divorce, 263-'4

Freedom, of conscience, 59, 66

press and speech, 66, 67

civil and political rights, 66

Freeholds, husband's interest in wife's, 311 to 313

wife's interest in husband's, 315-'16

Free schools, see *Education*.

Fugitive, from justice, cause of divorce, 265

Full age, 471, 472

*Fundator*, *perficiens*, and *incipiens*, of corporation, 574Gaol, see *Jail*.Gaoler, see *Sailor*.

Garter, knights of, 155

Gates, on highway, 120

Gavelkind, custom of, 33

*Gemote*, *wittena*, or *micel*, 68

General, or public, statute, 38

or great council of England, 68

Gentleman, 155

*Gerefa*, 91*Gilda mercatoria*, 509

Glanvil, 32

Glebes, sequestered in Virginia, 502

Government, required for society, 26

qualities, needful, 26

simple forms, 26-'7

mixed forms, 27

elements of English and American, 27,

declaration and guards of rights in England, 60 to 62

declaration and guards of rights in Virginia, 62 to 67

agents, liability of government for torts, 227

officer, liability of superior for subordinate, 228

Governor, meaning of in statutes, in Virginia, 41

Grand Jury, presentments required, when, 64

Great council, of England, 68

Guaranties, constitutional, of liberty, 62 to 67

Guardian and ward, relation of, 422 to 497

implies not orphanage, 422

*tutor* and *curator* in Roman law, 422



**Guardian—**

different kinds of, how appointed and power and duty, 422 to 470  
 different kinds, and how appointed, 422 to 433  
 guardians, by nature, 422 to 424  
 for nurture, 424  
 in chivalry, 424-'5  
 in socage, 425-'6  
 by election, 426-'7, 433, 471  
 in chancery, 427 to 429  
 in ecclesiastical court, 429  
 by 4 and 5 Ph. & M. 429-'30  
 by will of father, 430, 431  
 by custom, 431-'2  
*ad litem*, 432-'3, 475  
 circumstances under which different kinds of wardship occur, 433-'4  
 guardians in Virginia, who have care of ward's estate, 433  
 powers and duties of guardians, 436 to 444  
 powers limited to state, 435  
 transfer of ward's effects, 435-'6  
 custody of ward's person and education, 436 to 439  
 remedies for ward's abduction, 437 to 439  
 care of ward's estate, 439 to 444  
 what guardians have, 433, 439  
 right to sue, 439-'40  
 management and sale, 440-'41  
 execution of trust by infant trustee, 441-'2  
 ward's support and education out of *income*, 442 to 444  
 guardian's personal responsibility for support, 444  
 ward's personal responsibility, 444  
 guardian's accounts and allowances, 444 to 470  
 general accountability, 444-'5  
 particulars for which guardian liable, 445 to 450  
 estate in guardian's hands, 445-'6  
 losses by guardian's neglect, 446 to 449  
 losses by co-guardian's default, 449-'50  
 means to compel prompt settlements, 450 to 454  
 commissioner of accounts, 451  
 inventory and account of sales, 452  
 annual settlement, 452 to 454  
 mode of stating guardian's accounts, 454 to 470  
 general principles of statement, 454  
 allowances to guardians, 456 to 460  
 disbursements, 456  
 compensation, 457 to 459  
 guardian's private settlement, and conveyance by ward, 461

**Guardian—**

dealing for his own benefit with ward's property, 461  
 examination before commissioner, 461-'2  
 production of books and vouchers, 462  
 proceedings against guardian, and limitation thereto, 463-'4  
 termination of wardship, 471  
 doctrine as to capacities and incapacities of infants, 471 to 497  
 ages for divers purposes, 471  
 precise time of infant's majority, 472-'3  
 doctrine as to privileges and disabilities of infants, 473 to 497  
 as to infant's suing or being sued, 473 to 476  
 as to stay of proceedings against infants, 475  
 effect of judicial proceedings as to infants, 475-'6  
 infant's responsibility for crime, 476  
 as to infant's privileges and disabilities, touching property and contracts 476 to 497  
 touching disposition of property, 477  
 touching contracts executory, 477 to 497  
 contracts *valid*, 474 to 484  
 necessities, 479 to 482  
 marriage settlement, 482  
 apprenticeship, 482-'3  
 assignment of dower, 483  
 contracts *void*, 484 to 486  
 contracts *voidable*, 486 to 488  
 confirmation of infant's contracts, 488 to 495  
 acts for which infancy is no defence, 495 to 497  
 Guards of absolute rights in England, 61-'2  
 in Virginia, 62 to 67  
 Guernsey, isle of, 46  
*Habeas corpus*, nature and proceedings, 55 to 58  
 securities for, 56  
 suspension prohibited, 58, 63  
 to recover child by parent, 401-'2  
 to recover ward by guardian, 438-'9  
*Habitat*, of corporation, when created, 514 to 520  
 corporation may conduct business outside, when, 517-'18  
 corporation sued outside of, 519-'20  
 corporation may acquire lands outside, when, 549-'50  
 Habitation. See *Habitat*.  
 Hanover, 47  
 Head of church, King in England, 83, 574  
 Health, security of, 55



Hereditary right to crown, 75  
 Hexhamshire, 50  
 Hidage or hydage, 86-'7  
 High constable, 49, 109  
 High seas, 48  
 Highways, surveyors of, 112 to 120  
   means of keeping in repair, 115 to 117  
   redress if road not in repair, 116-'17  
   establishing and altering roads, and  
   landings, 117 to 119  
   preliminary examination by viewers  
   or commissioners, 117  
   summons to land-owners, 117-'18  
   writ of *ad quod damnum*, 118  
   sentence of court, 118-'19  
   road in several counties, 119  
   building bridges or causeways, 119  
   discontinuing roads and landings, 120  
   erection of gates, 120  
   extent of public right to, 120  
   dedication to public, 120  
   police regulations touching, 120, 121  
 Homicide, of husband by wife, &c.,  
   367-'8  
 Honor, King fountain of, 83  
 Hospitals, 508, 574  
 Hundreds, 49  
 Husband and wife, relation of, 230 to  
   373  
   definition of marriage, 230; coverture,  
   230-'31  
   baron and feme, 230  
   marriage a civil contract, 231  
   mode of contracting marriage, 231 to  
   253  
   willingness to contract, 231  
   *consensus non concubitas nuptias*  
   *facit*, 231  
   marriage-brochage contracts, 231-'2  
   capacity to contract, 232 to 242  
   in England, 232 to 238  
     canonical impediments, and why  
     so called, 232 to 237  
     pre-contract, 233-'4  
     consanguinity, 234 to 235  
     affinity, 235  
     incurable impotency, 236  
     effect of canonical impediments  
     236-'7  
   legal or civil disabilities, 237-'8  
     prior marriage, 237  
     want of age, 237  
     want of reason, 238  
     want of consent of parents, &c.,  
     238  
     effect of legal disabilities, 238  
   in Virginia, 238 to 242  
   impediments which make mar-  
   riage voidable, 239 to 242  
   incurable impotency, 240  
   consanguinity and affinity,  
   240-'41  
   want of reason, 240  
   conviction before marriage of  
   infamous offence, 240-'41

Husband and wife—  
   pregnancy of wife at marriage,  
   241  
   notorious prostitution of wife  
   at marriage, 241  
   disabilities which make marriage  
   void *per se*, 241-'2  
   prior marriage, 241  
   want of age, 241  
   difference of race, 242  
 actual contract of marriage, 242 to 253  
 contract of actual marriage, *in pre-*  
   *sent*, 242 to 249  
   circumstances needful in Eng-  
   land, 242  
   circumstances needful in Vir-  
   ginia, 243 to 249  
   effect of foreign marriages, 247 to  
   249  
   proof of marriage, 249  
   contract to marry *in futuro*, 250 to  
   253  
 modes of dissolving marriage, 253 to  
   280  
   death, 253  
   divorce, 253 to 280  
     divorce *a mensa*, 253-'4  
       causes for divorce *a mensa*, 254  
       to 261  
       effect of divorce *a mensa*, 271  
       to 276, 281-'2  
     divorce *a vinculo*, 254  
       cause of divorce *a vinculo*, 257  
       to 266  
       effects of divorce *a vinculo*, 272  
       to 278  
   courts charged with divorce causes,  
   266 to 270  
   modes of proceeding, 268  
   powers of court, 269  
   prohibition upon legislature to grant  
   divorces, 270-'71  
   effect of foreign sentence of di-  
   vorce, 279-'80  
   matrimonial causes other than di-  
   vorce, and courts, 280 to 283  
 legal consequences of marriage, 284  
   to 373  
   effect as between husband and wife,  
   284 to 334  
   as to their persons, 284 to 289  
     one in law, 284  
   husband's duties, 284-'5  
   wife's duties, 285-'6  
   husband's power to correct, 285-'6  
   deeds of separation, 286 to 289  
   as to their property, 289 to 334  
   touching contracts, &c., before  
   marriage, 289 to 291  
   touching contracts, &c., during  
   coverture, 291 to 297  
   conveyances one to another, 291  
   to 295  
   contracts executory between  
   them, 295

**Husband and wife—**

- testamentary dispositions, one to another, 295, 320-'21
- marriage settlements between them, 296-'7
- touching the property of each in regard to the other, 297 to 334
- wife's ante-nuptial conveyances &c., in fraud of husband, 297-'8
- interest of each in the other's property, 299 to 334
  - husband's interest in wife's property, 299 to 313
  - chattels, 299 to 311
  - freeholds, 311 to 313
  - wife's interest in husband's property, 313 to 316
  - wife's separate property, 316 to 334
- effect of marriage as to third persons, 334 to 367
- touching wife's ante-nuptial contracts, 334 to 336
- touching contracts made by wife during coverture, 336 to 338
- touching conveyances by and to wife during coverture, 338 to 341
- touching wife's contracts during coverture as respects husband, 341 to 345
  - on score of agency, 342, 343
  - on score of duty, 343 to 345
- touching husband's liability for wife's torts, 345 to 347
- suits by and against husband and wife, 347 to 364
- actions by husband and wife, 347 to 357
  - both must join, 347 to 348
  - husband must sue alone, 348 to 351
  - they may join or not, 351 to 353
  - wife may sue alone, 353-'4
  - who to sue, if either dies, 354 to 357
- consequences of mistake, 357
- actions against husband and wife, 357 to 364
  - both must be joined, 358
  - husband must be sued alone, 359-'60
  - they may be joined, 360
  - wife may be sued alone, 361
  - who to be sued if either dies, 361
  - consequences of mistake, 362-'3
- suits between husband and wife in equity, 363, 364
- liability of wife to be punished for crime, 365-'6
- husband and wife witnesses, 366-'7
- contrast of sexes in respect to rights, &c., 367 to 373
- in respect of crimes, 367 to 369

**Husband and wife—**

- in respect of civil rights, 370 to 373
- Hydage, or hidage, 86-'7
- Idiots, who are, and custody of, 85-'6
- marriage of, 238, 240, 247, 259, 262
- Ignorance, master's liability for servant's, 220
- Impediments, canonical to marriage, 233 to 236
  - marriage in Virginia, 239 to 241
  - See *Canonical impediments*.
- Imports, and exports, duty on by State, 65
  - duty on *exports* by U. States, 66
- Impotency, bar to marriage, 236, 240
  - cause of divorce, 258, 262
- Impressments, of seamen, 160
- Imprisonment, what is, 58
  - illegal, protection against, 56 to 59
  - duress of, 58; warrants for, 59
  - habeas corpus*, 61, 63
- Incapacities, of bastards, 419 to 421
- Incestuous marriages, 234-'5, 240, 243, 268
- Incidental prerogatives, 79
- Incorporation, power of, 508 to 511
- Indefeasible right, to crown, 75
- Indentures, of apprenticeship, 180-'81
- Independence of United States, date of, 146
- Indictment, mode of removal from office, 93
- Infamous offence, effect on marriage, 240-'41
  - cause of divorce, 262-'3
- Infant, marriage of, 237-'8
  - divorce for want of age, 259, 261-'2
  - license to marry, 244-'5
  - consent of parents, &c., to marriage, 238, 244-'5, 402-3
  - contract to marry *in futuro*, 250
  - obligation of father, and of mother, to support, 375 to 379
  - See *Parent & Child* and *Children*.
- power of parents over person, 396 to 403
- power of parents over estate, 403-'4
- guardian *ad litem* for, 432, 433, 475
- guardian's custody of person, 436 to 444
- ward, abduction of and remedies, 437 to 439
- ward, maintenance and education, 437, 442 to 444
- precise time of attaining age, 472
- privileges and disabilities, 473 to 497
- touching suits, 473 to 476
  - as plaintiffs, 473 to 475
  - prochein ami*, 474
  - guardian, 474
  - attorney, 474
  - as defendants, 475 '6
  - guardian *ad litem*, 475
  - attorney, 475
  - stay of proceedings, 475

**Infant—**

effect of judicial proceedings as to, 475-'6  
 as plaintiff, 475; as defendant, 476  
 leave to show cause, 476  
 responsibility for crime, 471, 476  
 touching property and contracts, 476 to 497  
 effect of lapse of time, 476  
 as to conveyance, will, &c., 477  
 as to contracts executory, 477 to 497  
 valid, void, and voidable, 477, 478  
 valid contracts, 478 to 484  
   necessaries, 479 to 482  
   marriage settlements, 482  
   apprenticeships, 482-'3  
   to do what law requires, 483-'4  
 void contracts, 484 to 486  
   principles of, and instances, 484-'5  
   why powers are, 485-'6  
 voidable contracts, 486 to 488  
   principles of, and instances, 486-'7  
   voidable by infant alone, 487-'8  
   difference *in effect* from void, 488  
 confirmation of contracts, 488 to 495  
   applies only to voidable, 488  
   avoidance against purchaser, 489  
   fraud as to age, 489  
   valid until avoided, 489  
   terms of ratification, 489 to 493  
   bond confirmed by parol, 490  
   to stranger, 490; by conduct, 491 to 493  
   continuing contracts, 491-'2  
   time and mode of avoidance, 494-'5  
   effect of avoidance, 493 to 495  
     contracts executory, 493  
     contracts executed, 494  
   avoidance entire, 494-'5  
   statute as to confirmation, 495  
     contracts to pay money, 495  
     collateral contracts, 495  
   avoidance of contracts of record, 495  
 acts for which infancy is no defence, 495 to 497  
   torts, 495-'6  
   ambiguous acts which may be torts, 496-'7  
 Information, in nature of *quo warranto*, 575, 576, 584

*Infra annum luctus*, 410  
 Inheritance, bastard's, 420-'21  
 Inns of court, 14 to 17  
 Inofficious testament, 375  
 Inquest, of coroner, 104  
   of office, by escheator, 131-'2  
 Insane person, meaning in statutes, 42  
*In sensu et re ipsa*, 512, 568  
 Institutes, Coke's, 32  
   Justinian's, 35-'6  
 Insurance companies, process in suits, 564, 568  
*In syllabis et verbis*, 512, 568  
 Interest, in guardian's accounts, 454, 455, 469  
 International law, 22  
 Interpretation, of laws, 28-'9  
*Interregnum*, 81  
 Inventory, by guardians, 452  
*In ventre sa mere*, 52, 409  
 Ireland, 45  
 Irish peers, 70  
 Isles, Man, 46  
   Jersey, Guernsey, Sark, Alderney, 46  
   Wight, Portland, Thanet, &c., 46  
   Ely, 50  
 Issue, effect of canonical impediments on legitimacy, 236-'7  
   effect on legitimacy, of civil disabilities, 239  
   legitimacy of, effect of divorce, 272, 275-'6  
 Jactitation of marriage, 280-'81  
 Jail, how kept, and expenses, 98-'9  
 Jailor, deputy of sheriff, 98  
   duties and liability, 98-'9  
   liability for escape, 99  
   transfer of prisoners, 99  
 Jay's treaty, 145, 146  
 Jeofails, as to infants, 475  
 Jeopardy, twice for same offence, 64  
 Jersey, isle of, 46  
 Jetsam, 85  
 Joint-stock companies. See *Corporations*.  
 Judges, of England, 82  
   signs to interpret laws, 28-'9  
 Judgment, prudence, skill, &c., required in agent, 199  
 Judgment against sheriff, effect as to deputy, &c., 98  
 Judicial decisions, effect of, 31  
 Judicial duties, sheriffs, 94-'5  
   coroners, 102, 103; justices of peace, 108, 109  
 Judicial power, separate from executive, 82  
*Jure divino*, title to crown, 74-'5  
*Jura regalia*, 46, 50  
 Jury, trial secured, 63, 64, 65  
 Justice, not to be sold, denied, or delayed, 60, 61  
   administration of required, 60, 61, 62  
   king, fountain of, 82  
   actual administration of, 82

- Land, power to convey to be under  
 will 20  
 responsibility of owner for estate.  
 20  
 conveyance of between husband and  
 wife 201 to 205  
 conveyance of by or to wife. 308 to  
 341  
 conveyances of by infants. 487. 492 to  
 495  
 Landings, establishment of. 117 to 119  
 discontinuance, 120  
 Lathes. 49

## Legislature—

- no limits to power of, 41
- of Virginia, power limited by Constitution, 40
- prohibited to grant divorces, 270, 271
- impair contracts, pass *ex post facto* laws, bills of attainder, &c. 62 to 67
- of U. States, see *Congress*
- act of, dissolving corporation, 578-'9, 584 to 587
- Legitimate child, 374 to 407
  - definition of, 374
  - duties of parents to, 374 to 396
    - maintenance, 375 to 380
    - protection, 380
    - education, 381 to 396
  - See *Education*.
  - powers of parents as to, 396 to 407
    - custody of person, and remedies, 397 to 402
    - consent to marriage, 402-'3
    - control of estate, 403-'4
    - delegation of authority, 404, 405
    - termination of power, 405
  - duties of, to parents, 405 to 407
    - obedience, protection, and maintenance, 406, 407
- Le grand coutumier*, 46
- Levitical degrees, 234, 235, 240
- Lex domicilii*, see *Domicilii*
- Lex loci contractus*, 549
- Lex loci rei sitæ*, 549
- Lex non scripta*, 30 to 37
- Lex scripta*, 37 to 43
- Liability, see *Master & Servant*, *Husband & Wife*, *Parent & Child*, *Guardian & Ward*.
  - shareholders in corporations, 505-'6
- Liberty, natural, civil political, 52
  - right of personal, 55
  - protection of, 55 to 59
  - press and speech, 67
- License, to marry, 244 to 247
- Life, security of, 52 to 54
- Ligan*, 85
- Ligeance, see *Allegiance*.
- Limbs, security of, 52 to 54
- Limitation, to proceedings against guardian, 463
- Limited partnership, 506, 507
- Literary fund, 388-'9, 393
- Littleton, tenures, 32
- London, customs, 33
- Lords, of parliament, 68-'9
  - privileges, 69
  - hereditary councilors, 76
  - how created and deposed, 154
- Lunacy, of principal revokes agency, 226
- Lunatics, who are, and custody of, 85-'6
  - marriage, 238, 240, 247, 259, 262
- Magisterial district, see *Township*.
  - school purposes, 390

- Magistrates, rights and duties, 68 to 133
  - supreme, 68 to 90
    - parliament, 68 to 74. See *Parliament*.
    - king, 74 to 90. See *King*.
  - subordinate, 91 to 133
    - sheriff, 91 to 100. See *Sheriff*.
    - coroner, 100 to 105. See *Coroner*.
    - justice of peace, 105 to 109. See *Justice of Peace*.
    - constable, 109 to 112. See *Constable*.
    - surveyor of roads, 112 to 121. See *Surveyors of Highways*.
    - overseer of poor, 121 to 128. See *Overseer of Poor*.
    - escheator, 128 to 133. See *Escheator*.
    - supervisors, 133. See *Supervisors*.
- Magna Charta*, protection to life and liberty, 60
  - protection to property, 59, 60
  - extorted from John, and provisions, 60
  - guaranties justice, 60
- Magnatum scandalum*, 154
- Maintenance, of suits between master and servant, 200, 201
  - between parent and child, 380
  - of legitimate child by parents, 375 to 380
  - of child, out of his own estate, 378
  - of parents, by children, 407
  - bastards, 412 to 416
  - wife, 343 to 345
- Majority of corporation, 533
  - when infant attains, 472-'3
- Malfeasance, of officer, cause of amotion, 93
- Malicious torts, of servants, master's liability, 220
- Malus usus abolendus est*, 33
- Man, isle of 46
- Mandamus*, suit of, as to corporations, 574, 575
  - to enforce road-law, 119
- Manumission, of slaves, 167 to 169
- Marches, 153
- Mariners, impressment of, 160. See *Sailors*.
- Maritime state, 159-'60
- Marque and reprisal, letters of, 81
- Marquis, 153
- Marriage, of female servant, 194
  - of female principal, revokes agency, 226
  - relation of husband and wife, and rights thereon arising, 230 to 373
  - definition and character of, 230
  - how contracted, 231 to 373
  - brocage-contracts, 231-'2
  - capacity of parties to contract, 232 to 253
    - canonical impediments, 232 to 237
    - legal or civil disabilities, 237, 238
    - impediments and disabilities in Virginia, 239 to 242

**Marriage—**

- actual contract of *in presenti*, 242 to 249
  - at common law, 242-'3
  - in Virginia, 243 to 247
  - foreign, 247 to 249
  - proof of, 249
- contract to marry *in futuro*, 250 to 253
  - circumstances of contract, 250
  - mode of enforcing, 251
  - defences to action, 251 to 253
  - damages in action, 253
- dissolution of by death or divorce, 253 to 283
  - See *Divorce*.
- legal consequences of marriage, 284 to 367
  - effect as between husband and wife, 284 to 334
    - in respect of their persons, 284 to 289
    - in respect to their property, 289 to 334
    - See *Husband & Wife*.
  - effect as to third persons, 334 to 367
    - as respects the wife herself, 336 to 341
      - wife's ante-nuptial contracts, 335, 336
      - contracts during coverture, 336 to 338
      - conveyances, 338 to 341
    - as respects husband, 341 to 347
      - wife's ante-nuptial contracts, 335-'6
      - contracts during coverture, 336 to 345
      - torts by wife, 345-'6
    - suits by and against husband and wife, 347 to 364
      - actions by husband and wife, 347 to 357
      - actions against husband and wife, 357 to 364
    - wife's liability to punishment for crime, 364 to 366
      - husband and wife witness, one for another, 366-'7
  - contrast of sexes as to rights and privileges, 367 to 373
- Married women. See *Feme covert*, *Feme Sole*, *Wife*.
  - contract as *feme sole*, when, 337-'8
  - separate estate, liability for debts, 316 to 333
  - separate estate, power to alienate or change, 322 to 333
  - See *Husband & Wife*.
- Master and servant, relation of, 160 to 188
  - definition of, 160
  - several classes of servants, 160 to 188
  - slaves, 160 to 180

**Master and servant—**

- menials, 180
- apprentices, 180 to 188
- laborers, 188
- stewards, factors, bailiffs, &c., 188
- effect of relation on master and servant, 188 to 200
- relation depends on contract, 188 to 197
- mode of contracting for service, 189
- indefinite contract of service, in point of time, 190
- entire contract of service, 190 to 191
- effect on wages of servant's sickness, 191
- dissolution of contract of service, 191 to 193
  - mutual consent, 192
  - act of master, 192
  - act of servant, 193
  - act of God, 193
- effect of marriage of female servant, 194
- authority of master, 194
- obligation of master, as to servant, 194 to 197
  - as to wages, 194-'5
  - maintenance, 195
  - medical attendance, 195-'6
  - servant's personal safety, 196-'7
    - character of employment, 196
    - default of fellow-servant, 196-'7
  - indemnifying servant, 197
- peculiar privileges of apprentices, in England, 197
- homicide of master by servant, 197
- testimonials to character, 197-'8
- liability of servant to master, 198 to 200
  - duration of service, 198
  - conduct and care, 198-'9
  - appropriation of master's goods, 199, 200
  - rendering accounts, 200
  - dealing for his own benefit, with master's business, 200, 222-'3
- effect of relation as to strangers, 200 to 230
  - mutual personal defence, and maintenance of suits, 200-'1
  - seducing away or hiring servant, 201
  - personal torts done to servants, 201-'2
  - contracts made and acts done by servants, 202 to 221
    - contracts, 202 to 218
    - torts, 218 to 222
  - termination of relation, 223 to 227
  - doctrine where government and its servants are concerned, 227 to 229
  - doctrine as to liability of government officer for subordinate, 228
  - liability of municipal corporation for torts by its servants, 229

**Master and servant—**  
     liability of employer for contractor, 229-'30  
     liability of owner of real property for hurtful use, 230  
**Matrimonial causes, 280 to 284**  
**Mayhem, 53**  
**Measures and weights, 83**  
**Medicines, for apprentices, 183**  
     for servants generally, 195-'6  
**Meetings, of corporators for organization, 528-'9**  
     of corporation in general, 531 to 534  
     time, place, notice, 531-'2  
     persons composing, rules, 532 to 534  
**Members of parliament, 68 to 72**  
     lords, spiritual and temporal, 68-'9  
     commons, 70 to 72. See *Commons*.  
**Menials, who, and why so called, 180**  
     See *Master & Servant*.  
***Mensa et toro*, nature of divorce, 253 '4**  
     causes of divorce, 254 to 257, 259 to 261  
     powers of court in divorces, 269-'70  
         as to estate and children, 269  
         as to *perpetual separation*, 269-'70  
     power of legislature, 270-'1  
     effect of divorce, 271 to 276  
         as to capacities of parties, 271-'2  
         274-'5  
         as to legitimacy of issue, 272, 275  
         as to estate of parties, 273, 276  
***Mercen-lage*, 31**  
**Metropolitan, 148**  
***Michel gemote*, 68**  
**Military, courts, laws used, 35 to 37**  
     subordinate to civil power, 66  
     State, who compose, 156 to 159  
     power of king, 82  
     danger of standing armies, 156  
     See *Public Defence*.  
**Militia, safe defence of State, 66**  
     in England, 158  
**Minor, see *Infant*.**  
**Minority, none in king, 81**  
     See *Infancy, Infant*.  
**Ministers, of king, responsible, 80, 81**  
***Mis-user*, of franchises of corporation, 576**  
     forfeiture of franchises by, 582 to 584  
     forfeiture of office by, 93  
**Monarchy, characteristics of, 27**  
     features of in English and American Governments, 27  
**Money, paid from treasury only by law, 65**  
     acts appropriating, how passed, 65  
     coining, 83  
**Monk, 53, 547**  
**Monopoly, not favored, 588**  
***Monstrans de droit*, 132**  
**Month, meaning of, 42**  
***Mortis causa*, donations, between husband and wife, 320**  
**Mortmain, policy of, 547 to 549**

**Mother, obligation to support child, 377, 400, 413**  
     natural guardian, when, 398, 400, 416, 423, 434  
     guardian for nurture, 424  
     of bastards, complaint against father, 412 to 416  
     of bastard, competent witness against father, 415  
     of bastard, entitled to custody, when, 398, 400, 416, 434  
**Municipal corporations, liability of for the torts of officers, 229**  
     liable to modification at pleasure of legislature, 503, 579  
     individual corporators liable for debts, 503  
     cannot divest itself of legislative power, 538-'9  
     what is, 579  
**Municipal law, definition of, 22**  
     particulars contained in definition, 23 to 27  
         a rule, permanent, uniform, &c., 23  
         a rule of *civil conduct*, 23  
         a rule *prescribed*, not *retrospective*, 23 to 26  
         several classes of retrospective laws, 24  
         time, whence laws take effect, 25  
         mode of publication, 25-'6  
         a rule prescribed by *law-making* power, 26-'7  
         nature of society and civil government, 26  
         qualities needed in government, 26  
         different forms of government, 26-'7  
             simple forms, 27  
             mixed forms, 27  
             obligation to enact best laws, 28  
         several parts of a law, 28  
         obligation to obey, 28  
         interpretation of laws, 28-'9  
         method, in Roman law, 28  
         signs whereby to interpret will of law-giver, 28-'9  
         words, context, subject matter, 28-'9  
         effects and consequences, 29  
         reason and spirit, 29  
         natural equity, 29  
         technical equity, 29, 30  
         definition of equity, 29  
         distinctions, courts of law and of equity, 29, 30  
**Mutilation, 191**  
**Mutiny act, annual, of England, 158-'9**  
**Mutuality, in subscription to corporations, 529**  
     in contracts of corporations, 538  
**Names, of worship, not of dignity, 155**  
     of corporations, 511 to 514  
     of corporations, to be observed, 512 to 514



- Names—**  
 change of, in corporations, 514  
 variety of, in corporations, 513-'14  
**National defence, arrangements for, in England, 156 to 160**  
**Nations, law between, 22**  
 safe conduct from king, 52  
**National banks, power of congress to create, 510**  
 state taxes on, 516-'17  
 personal liabilities of shareholders, 505-'6  
 no lien on shares for dues, 554  
**Naturalization, in England, 138**  
 in United States, 139 to 141  
**Natural, liberty, 52**  
 life, 54  
 persons, 52, and seq. 497  
 born citizen, 137 to 139  
**Nature, law of, 22**  
 guardian by, 422  
**Naval discipline, 160**  
**Navigation acts, in England, 159**  
**Necessaries, for apprentice, 183-'4**  
 for wife, 343 to 345  
 infant child, 375 to 378  
 infant's contracts for, 479 to 482  
 what are, 479  
 when supplied elsewhere, 479  
 particular instances of, 479 to 482  
 mere ornaments, never, 479, 480  
 money lent, 480-'81  
 form of contract, 481  
 for wife, children, &c., 481-'2  
 when under control of parent, &c., 482  
*Ne exeat regno*, writ of, 82  
**Negative, or veto, of king, 82**  
**Neglect, of servant, master's liability, 219-'20**  
**Negotiable securities, of wife, 299**  
 by infant, 485  
**Negro, slavery. See Slavery.**  
 who is in Virginia, 179-'80, 242  
 marriage with white person, 242, 262  
 marriages of, 244  
**Nobility, who compose, 153-'4**  
**Non-claim, or infants, 476**  
*Non compos mentis. See Idiots and Lunatics.*  
**Non-feasance, cause of amotion from office, 93**  
**Non-user, cause of amotion from office, 93**  
 of franchises of corporation, 576  
 forfeiture of franchise by, 581 to 583-'4  
**Novels, of Roman law, 36**  
*Nullius filius*, 416, 421  
**Numa, laws of as to corporations, 500**  
**Nurture, guardian for, 424**  
**Oaths, of office, 94**  
 sheriff, 94; deputy sheriff, 96  
 justice of peace, 108; constable, 111  
 surveyor of highways, 115  
**Oaths—**  
 overseer of poor, 123; escheator, 130  
**Obedience, to law a moral duty, 28**  
 servant to master, 192, 194, 198  
 apprentice to master, 184, 185  
 children to parents, 406  
**Objects of common and statute law, 61**  
**Obligation of human law, 28**  
**Office, king, fountain of, 83**  
 oaths of, 94  
 bond of, 94  
 removal from, causes and modes, 93  
 found by escheator, 131 to 133, 145  
**Officers, supreme, in England, 68 to 90**  
 subordinate, several kinds, duties, &c. 90 to 133  
 See *Sheriff, Coroner, Justice of Peace, Constable, Surveyor of Highway, Overseer of Poor, Escheator, Supervisors,*  
 superior, liability for subordinate, 228  
 of corporations, 525 to 527  
*de facto*, acts bind when, 525  
 holding over, 525  
 amotion of, 527  
**Official bonds, see Bonds.**  
**Ordinary, the visitor of ecclesiastical corporations, 574**  
**Organization, of corporations, 520 to 531**  
 acceptance of charter, and proof of it, 520-'21  
 attributes or incidents, 521 to 523  
 admission and election of members, and officers, 523 to 525  
**Overseers of poor, 121 to 128**  
 antiquity and original, 121  
 appointment and removal, 122-'3  
 fidelity secured, 122, 123  
 duties of, 123 to 128  
 board of overseers, 123  
 superintendent of poor, 124  
 powers and duties of overseers singly, 124 to 128  
 poor to be provided for, 124-'5  
 application for relief, 125-'6  
 redress, if denied, 126  
 mode of maintenance, 126  
 removal of intruders, 126-'7  
 beggars and vagrants, 127  
 pauper children and bastards, 128  
**Overseers of roads, see Surveyors of Highways.**  
**Outlawry, of corporation, 571, 572**  
**Oxford, see Universities.**  
**Palatine counties, 50**  
**Pandects, of Justinian, 35-'6**  
*Pater est quem nuptiae demonstrant*, 374  
**Paraphernalia, of wife, 301-'2, 314**  
**Pardon, power of in England, 82**  
**Parent, and child, relation of, 374 to 421**  
 consent to marriage of infant child, 238, 244-'5  
 children legitimate, 374 to 407  
 definition of legitimate child, 374

**Parent—**

duties of parents to legitimate child,  
   374 to 396  
   maintenance, 375 to 380  
   favor shown to children, 379-  
   '80  
   protection, 380  
   education, 381 to 396  
   See *Education*.  
 power of parents as to legitimate  
   children, 396 to 405  
   custody and correction, 396 to 402  
   interposition of equity, 399,  
   400  
   remedies for abduction, 400 to  
   402  
   consent to marriage, 402-'3,  
   244-'5  
   care of estate, 403-'4  
   delegation of authority, 404-'5  
   in parent's life-time, 404  
   by will, 404-'5  
   termination of authority, 405  
 duties of legitimate children to pa-  
   rents, 405 to 407  
   obedience, 406  
   protection, 407  
   maintenance, 407  
 children, illegitimate, or bastards, 407  
   to 421  
   definition of bastard, 407 to 412  
   bastards born before coverture,  
   408-'9  
   born during coverture, 408-'9, 411-  
   '12, 412-'13  
   born after coverture ended, 408 to  
   411  
   duty of parents to bastards, 412 to  
   416  
   compelling father to support, 412  
   to 416  
   custody of child, 416  
   rights and incapacities of bastards,  
   416 to 421  
   See *Bastards*.  
 Parishes, 48, 151-'2  
 Parish clerk, 152  
 Parliament, constitution, powers, &c.,  
   62  
   omnipotence of, 41  
   original and antiquity, 68  
   summons and assembling, 68  
   constituent parts, 68 to 72  
   king, 68; lords, 69; commons, 70  
   to 72  
   See *those titles*.  
   laws and customs of, 72-'3  
   proceedings in, 73  
   dissolution of, 73-'4  
 Parol agreements, statute of, 189  
 Parol demurrer, for infancy, 475  
 Parsons, 151, 502  
 Partitions, by infants, valid, 483  
 Partnership, limited, 506-'7  
   between corporations, 511

Patent of peerage, 154  
 Paternity, double, 410  
   certain, obviates bastardy, 408  
   in gifts to bastards, fatal to validity,  
   417  
 Paupers, see *Overseers of Poor*.  
 Payment of wages, when presumed, 195  
   to infant, 195  
   of legacies to infants, to fathers, &c.,  
   403-'4  
 Peace, king's power to make, 81  
   conservation of, see *Conservation of  
   Peace*.  
 Peers, see *Lords*.  
   why so called, 153, 155  
   mode of creating, 154  
 Peerage, ranks of, 153-'4  
   writ, and patent of, 154  
   incidents to, 154  
 Pembrokeshire, 50  
 Penal statutes, 40  
 Penalties, in infant's contracts, 485  
   by by-laws of corporations, 554-'5  
 Penitentiary, sentence to, cause of di-  
   vorce, 264-'5  
 People, relation of, 134 to 160  
   classes in England, 137-'8  
   classes in Virginia, 138 to 141  
   clergy and laity in England, 148 to 152  
   civil state, 153 to 155  
   military and maritime state, 156 to 160  
 Perpetual separation, of husband and  
   wife, 269-'70, 275, 276  
 Perpetual succession, of corporations,  
   498, 499, 534,  
 Perpetuity of king, 81  
 Personal representative, meaning in  
   statutes, in Virginia, 42  
   husband is of wife, 305, 311  
 Persons, natural, and their rights, 51-'2,  
   497  
   artificial, or corporations, 497-'8  
   natural or artificial compose corpora-  
   tions, 511  
 Petition of right, 61  
   remedy for lands escheated, 132  
 Petition, right of to king and parliament,  
   62  
   right of to government, in U. States,  
   67  
   for escheated lands, 132-'3  
 Petit treason, 368  
 Petty constable, 109  
 Philip and Mary, guardians by statute,  
   429-'30  
 Pin-money, 295, 321-'2  
 Place, of corporation, 514 to 520  
   imposition of taxes on corporations,  
   514 to 517  
   conducting business, 517 to 519  
   suing and being sued, 519-'20, 564  
   in federal courts, 519  
   in State courts, 520, 564  
   of corporate meetings, 528, 532  
 Plantations, and colonies, laws of, 46-'7

- Plowden's reports, 32  
 Political rights, of all, equal, 66  
   liberty, 52  
 Polygamy, 230, 237, 241, 247, 249, 261  
 Poor. See *Overseers of Poor*.  
   who are poor, 124  
   what to be provided for, 124-'5  
   to whom to apply for relief, 125-'6  
   modes of maintaining, 126  
   settlement of, 126  
   intruders removed, 126-'7  
   beggars and vagrants, 127, 128  
   children, proceedings as to, 128  
     bastards, 128  
     pauper children, 128  
 Poor-laws, 123 to 128  
 Poor-settlement, 124-'5  
 Portland, island of, 46  
 Ports, of States, no preference allowed, 66  
 Posse comitatus, 100  
 Posthumous children, 379-'80  
*Post nati*, 146, 148  
 Post-office, duties arising from, in England, 89  
 Poundage, 88  
 Powers, parents over legitimate children, 396-'7  
   of attorney by infants void, 485  
   of corporation, 521, 522, 534 to 570  
     perpetual succession, 521, 534  
     common seal, 522, 535 to 537  
     contract and be contracted with, 522, 537 to 547  
     take, hold, and transmit property, 522, 547 to 552  
     make by-laws, 522, 553 to 555  
     sue and be sued, 522, 555 to 570  
     remove members and officers, 522 to 527, 570  
     disabilities of corporations, 570 to 572  
 Precedents, judicial, effect of, 31  
 Pre-contract, effect as to marriage, 233-'4  
 Pregnancy, of wife at marriage, effect, 241  
   cause of divorce, 263  
   trial by writ *de ventre*, &c., 409-'10  
 Prerogatives, limitation on royal, 62  
   of king of England, 78 to 83  
     relating to king's dignity, 79 to 81  
       personal pre-eminence, 79  
       absolute perfection, 80  
     relating to king's authority, 81 to 83  
       foreign concerns, 82  
       domestic affairs, 81 to 83  
         part of legislature, 82  
         *generalissimo* of realm, 82  
         fountain of justice, 82  
         fountain of office, &c., 83  
     relating to king's revenue, 83 to 90  
 Prescription, nature of, 34  
   contrasted with *custom*, 34-'5  
   corporations by, 509  
 Presentative advowsons, 151  
 President of corporation, power of, 546  
 Press, freedom of, 67  
 Pressing seamen, 160  
 Prince of Wales, 76  
 Primate, 148  
 Princess, royal, 76  
 Principal, and agent, relation of, 160 to 230  
   agent to render accounts, 200  
   *qui facit per alium, facit per se*, 200  
   principal's liability for contracts, 203 to 216  
   express authority, 203  
   implied authority, 204 to 206  
     recognition of similar acts, 204  
     connexion with agent's business, 204  
     being an essential incident, 205-'6  
     subsequent ratification, 206  
   extent of agent's authority, 206 to 209  
     joint authority, 207  
     general authority, 208  
     special authority, 208-'9  
   power to delegate authority, 209  
   agent's mode of contracting, 209 to 212  
     agent's declarations as evidence, 212  
   agent's liability on contracts, 212 to 216  
   mode of suing agent personally, 216  
   rights of principal on contracts by agent, 217  
   rights of agent on contracts made by him as agent, 217  
   principal's liability for torts by agent, 218 to 221  
     grounds and limits of his ability, 218  
     instances of liability, 219 to 221  
   agent's liability for torts done by him, 221-'2  
   agent's dealing with subject of agency, 200, 222-'3  
   termination of agency, 223 to 227  
   government agents, 227  
   superior government officer and subordinate, 228  
   municipal corporation's agent, 229  
   agent and sub-agent contrasted with contractor, 229  
   real property used for hurtful purposes, 230  
 Prior marriage, effect of, 237, 241, 254, 261  
 Prisage, 88  
 Prison. See *Jail*.  
 Private act of legislature, 23, 38, 39  
 Private corporation, what is, 503  
   modification by legislature, 503, 578-'9  
   584 to 588  
   charter a contract, 503, 515, 578-'9, 584 to 588  
   may surrender charter, 580  
   charter when repealable, 584 to 588  
   subject to eminent domain, 503, 535, 587  
   when State is shareholder, 579

- Private property, an absolute right, 59  
 guaranties of in England, 60, 61  
 in Virginia, 64 to 66  
 compensation for, 59, 64, 65
- Privileges, of lords of parliament, 69  
 commons, 72  
 infants, 473 to 497  
 suing or being sued, 473 to 476  
 property and contracts, 476 to 497  
 torts, 495 to 497. See *Infants*.
- Privy council, constituents and power, 77-'8
- Process of law, to deprive one of rights, 63, 64  
 against corporations, 564 to 568
- Prochein ami*, 475
- Profits to crown, 84 to 86  
 demesne lands, 84; wine license, 84;  
 courts, 84; forests, 84; royal fish, 84;  
 wrecks, 84; mines, 85; treasuretrove,  
 85; waifs, 85; estrays, 85; deodands,  
 85; escheats, 85; idiots and lunatics,  
 85-'6
- Promulgation of laws, 25-'6
- Proof, of statutes, 38-'9  
 marriage, 259-'60
- Property, right of, 59  
 origin of right, 59  
 . protection to, 59, 60, 64, 65-'6  
 private, compensation for, 59, 64, 65  
 personal, rights of *aliens* as to, 142 to 148  
 law which governs disposition of, 142-'3  
 real, rights of *aliens*, as to, 143 to 148  
 rights to, conferred by marriage, 289 to 334  
 effect of divorce on, 273-'4, 276 to 278
- Proprietary governments, 47
- Prorogation of parliament, 73
- Prostitution of wife, effect on marriage, 241, 263  
 cause of divorce, 263
- Protection, children, 380  
 maintenance of suit, 380  
 allows defence, 380  
 extenuates homicide, 380  
 by children, 407
- Provinces, Canterbury and York, 48, 148
- Provincial governments, 47
- Proxy, of lords in parliament, 69  
 in corporate meetings, 524
- Prudence, skill, judgment, &c., what required in agent, 199
- Prudentum responsa*, 35
- Publication, of statutes, 25-'6
- Public corporations, nature of, 503  
 change by legislature, 503
- Public education, see *Education*.
- Public defence, in England, 156 to 160  
 militia in Virginia, 66
- Public schools, see *Education*.
- Public school system, see *Education*.
- Public statutes, 38
- Punishments, cruel and unusual, 63, 64
- Qualifications of electors and members of parliament, 70 to 72
- Quartering of soldiers, 61
- Queen, regent, consort, dowager, 75-'6
- Qui ex damnato coitu nascuntur, inter liberos non computentur*, 421
- Quod nolunt leges Anglicamutare*, 13
- Quorum*, 533
- Quo warranto*, mode of removal from office, 93  
 against corporations, 564, 576, 583-'4
- Rapes, English divisions of counties, 49
- Ratification, of infant's contracts, 489 to 495
- Ravishment, of ward, writ of, 401, 438
- Reading law, 18 to 21
- Real property, liability of owner for hurtful use, 230  
 See *Lands*.
- Reason, and spirit of law, 29  
 want of, invalidates marriage, 238, 239, 240, 241, 259, 262  
 want of in infants, 473, 475, 478  
 See *Infants, Idiots, Lunatics*.
- Regnant, queen, 75
- Register, marriage, 245, 247
- Relations, public and private, 68 to 497  
 public, 68 to 160  
 magistrates, 68 to 138  
 magistrates, supreme, 68 to 90  
 parliament, 68 to 74  
 king, 74 to 90  
 See *Parliament, King*.  
 magistrates, subordinate, 90 to 133  
 people, 134 to 160. See *People*.  
 private, 160 to 497  
 master and servant, 160 to 230  
 See *Master & Servant*.  
 husband and wife, 230 to 373.  
 See *Husband & Wife*.  
 parent and child, 373 to 421.  
 See *Parent & Child*.  
 guardian and ward, 422 to 497.  
 See *Guardian & Ward*.
- Relative rights, 68 to 497  
 public, 68 to 160  
 private, 160 to 497 See *Relations*.
- Release, by ward to guardian, when void, 461, 485
- Religion, freedom of belief, 59, 66, 67
- Remedies, retrospective laws as to, 24-'5
- Remedial part of law, 28  
 statutes, 39, 40
- Removal, from office, causes and modes, 93, 101-'2, 107, 111, 114, 122, 130  
 officer from sphere of duty, effect, 93  
 pauper, 127-'8  
 child from parent, 399  
 guardian, 399
- Repeal, of repealing statute, effect, 41
- Reports, early English, 32
- Representation, by ambassadors, &c., 81  
 in parliament, 70 to 72

- Reputation, security of, 55  
 Rescripts of Emperor, 28  
 Residence, of paupers, 126  
     apprentice, 181, 185-'6  
     woman, as to marriage license, 244  
     purposes of divorce, 267, 279-'80  
     infants for guardianship, 428  
     corporations, 514 to 520  
*Respondeat superior*, 227-'8  
*Responsa prudentum*, 35  
 Restitution, of conjugal rights, 281  
*Restitutor legum Anglicanarum*, 31  
 Restraining statutes, 39  
 Restrictions, on corporations not fa-  
     vored, 539  
 Retainer, of another's servant, 187, 201  
 Retrospective laws, 24, 25  
 Revealed law, 22  
 Revenue, of crown, 83 to 90  
     ordinary, 83 to 86  
         ecclesiastical sources, 83-'4  
         temporal sources, 84 to 86  
     extraordinary, 86 to 90  
         ancient modes of taxation, 86 to 87  
         modern modes of taxation, 87 to 90  
     application, 90  
     annual expenses of public service, 90  
     civil list, 90  
     national debt, 90  
 Reversionary interests, of wife, 310-'11  
 Revisals, of code, how construed, 41  
 Revival, of corporations, 578  
 Revocation, of agent's authority, 223-'4  
     wife's agency, 342  
     husband's duty to wife, 343-'4  
     wills by subsequent birth of child,  
         379-'80  
 Ridings, of Yorkshire, 49  
 Rights, correlative of duties, 51  
     which concern the person, 51-'2  
     perfect and imperfect, 51  
     natural persons, 51-'2  
     absolute, nature and several sorts, 52  
         to 67  
         personal security, 52 to 55, 62 to 64  
         personal liberty, 55 to 59, 62 to 64  
         private property, 59, 64 to 66  
         freedom of conscience, 59, 60, 66  
         declarations and guards of, in Eng-  
             land, 60 to 62  
         in Virginia, 62 to 67  
     relative, 67 to 497  
         public, 67 to 160  
             magistrates, 67 to 133  
             supreme, 67 to 90  
             subordinate, 91 to 133  
             people, 134 to 160  
         private, 160 to 497  
             master and servant, 160 to 230  
             husband and wife, 230 to 373  
             parent and child, 374 to 421  
             guardian and ward, 422 to 497  
             artificial persons, or corporations,  
                 497 to 588  
 Right, petition of, 61  
 Rival franchise, 587-'8  
 Roads, see *Highways*.  
     surveyor of, 112 to 121  
     commissioners of, 114, 117, 119  
 Roman law, what, and in what courts  
     used, 35, 36  
 Royal family, 75-'6. See *King*.  
     councils, 76 to 78  
     duties, 78  
     prerogatives, 78 to 83  
     revenue, 83 to 90  
     assent to laws, 82  
 Rural dean, 151  
 Rural deanery, 48  
 Sacristan, 152  
 Safe conduct, 81  
 Sailors, impressment, 160  
     naval discipline, 160  
     privileges, 160  
 Sale, of office, cause of amotion, 93  
     by guardian of ward's lands, 440-'41  
     ward's chattels, 441  
     guardian's account of, 452  
 Salvage, 85  
     allowed to corporations, 539  
 Sark, isle of, 46  
*Scandalum magnatum*, 154  
 Schools, see *Education*.  
 School-master, 404  
*Scire facias*, against corporations, 584  
 Scotland, 45  
 Scots peers, 64  
 Scroll, when a seal, 536-'7  
 Scutage, 86  
 Seal, meaning in statutes, 42  
     common, of corporations, 522, 535 to  
         537  
 Seamen, see *Sailors*.  
 Security, right of personal, 52  
     life, limbs and body, 52 to 55  
     health and reputation, 55  
 Seduction, of daughters, 201, 202  
     female servants, 201, 202  
     servants, 201  
         apprentices, 187  
 Self-crimination, see *Crmination*.  
 Self-defence, 53  
 Seminaries of learning, 500, 501  
 Separate property, of wife, 316 to 333  
     nature and origin of, 316-'17  
     phraseology which creates, 317 to 319  
     trustees in case of, 319  
     conveyances, between husband and  
         wife, 319-'20  
     pin-money, 321, 322  
     wife's power of disposition, 322 to  
         333  
     wife's power to alienate, 322, 323  
     charge, 324 to 326  
     restraints as to charging, &c., 327 to  
         332  
     trading with, 332, 333  
 Separation, U. States from England,  
     146  
     husband and wife, decree for, 269-'70

- Separation—**  
     effect of, 276  
     deeds of, 286 to 289  
**Septennial parliament, 74**  
**Servant, and master, relation of, 160 to 230**  
     definition, 160  
     different kinds, 160 to 188  
     contract to serve for life, 179  
     relation depends on contract, 188 to 197  
         indefinite hiring, 190  
         entire contract, 190-'91  
         effect of sickness on wages, 191  
         dissolution of contract, 191 to 194  
         effect of marriage of female, 194  
         authority of master over, 194  
         obligation of master as to wages, &c., 194, 195  
         obligation as to maintenance, 195  
         obligation as to medicines, &c., 195-'6  
         obligation as to servant's personal safety, 196-'7  
         obligation as to indemnifying servants, 197  
     peculiar privileges of apprentices in England, 197  
     homicide of master by, 197  
     master's testimonials to character, 197, 198  
     liability to master, 190 to 200  
     dealing with subject of agency for his own benefit, 200, 222-'3  
     defence of master, &c., 200, 201  
     retainer by another, 201, 187  
     personal torts done to, 201-'2  
     seduction of female, 201-'2  
     contracts and torts by, 202 to 223  
         contracts made by, 202 to 217  
         torts done by, 218 to 223  
     termination of relation, 223 to 227  
     of government, 227-'8  
     municipal corporation, 228  
     distinguished from contractor, 229  
     See *Master & Servant, Agent*.  
**Service, contract for perpetual, 179**  
**Settlement, act of in England, 61**  
     of pauper, 124-'5: bastard, 419  
     marriage, 296-'7  
     guardian's accounts, 452 to 470  
     guardian's private with ward, 461  
     ward's release or conveyance, 461  
     marriage, by infants, 482  
**Sextons, 152**  
**Sexes, contrast in rights, &c., 367 to 373**  
     differences as to crimes, 367 to 369  
     civil rights, 369 to 373  
**Shares, in corporations, personal estate, 506, 551**  
     subscription for, 528 to 531  
     assessment on, 530, 531  
     transfer of, 523, 554, 573  
     liens on for dues to corporation, 554  
**Shareholders, limit of responsibility for**  
     debt of corporation, 505-'6  
     national banks, liability of, 505  
     circuit court corporations, liability of, 505-'6  
     transfer legal and equitable title, 523, 554, 573  
     torts and contracts of corporations, 572-'3  
**Sheriff, antiquity and original, 91**  
     appointment and removal, 92, 93  
     fidelity secured, 93-'4  
     duties, 94 to 96  
     assistants, 96 to 100  
         deputy or under sheriff, 96 to 98  
         jailer, 98: bailiff, 100  
         *posse comitatus*, 100  
**Shipwreck, 84-'5**  
**Shire, or county, 49, 50**  
     *gerefa*, 91  
**Skill, prudence, &c., required of agent, 199**  
**Slaves, see *Slavery and Slave-trade*.**  
**Slavery, definition, 160**  
     in England, 161, 165, 178  
     origin generally and in Virginia, 162, 163  
     justification in Virginia, 163  
     history of in Virginia, 163 to 174  
         first progress, 164  
         efforts to stop importation, 164  
         final prohibition of trade, 164  
         what persons enslaved, 165  
         penal legislation as to slaves, 165-'6  
         manumission of slaves, 167 to 169  
             mode of manumission, 167  
             conditional, future, *elective*, 167-'8  
             contracts of with slaves, 168-'9  
             mode of recovering freedom, 168-'9  
         damages recovered, 169  
     liability of hirer of slaves, 169-'70  
     safe return of slave, 169-'70  
     apportionment of slave hires, 170  
     medical bills, 170  
     what persons were slaves at abolition of, 171  
     proposals for general emancipation, 171-'2  
     abolition of in Virginia, 172-'3  
     recovery in suits for, 173, 179  
     bonds for price of slaves, 173-'4  
     federal government, as to, 174 to 176  
     recognition of slavery, 174  
         as to apportionment of taxes, &c., 174  
         as to slave-trade, 174-'5  
         as to fugitive slaves, 175-'6  
     African slave-trade, 176-'7  
     effect of going to another country, 177 to 179  
     wages, when slave still serves, without agreement, 179  
     contract to render perpetual service, 179



**Slavery—**

who deemed *negro* or *colored person*, 179-'80

Slave-trade, efforts of Virginia to abolish, 164

as to Indians, 165

abolished by England (1806), 176

by United States (1808), 175, 177

present status, 177

Socage, guardian in, 425-'6

Society, requires government, 26

Soldiers, quartering, 61

annual mutiny act, 158-9

disabled, provision for in England, 159

Sole corporation, 502

Solon, laws of as to corporations, 499

Speech, freedom of, 67

Stamp-duties, 89

State, meaning in statutes, 41

not to contract debts, 65

power to create banking corporations, 510-'11

not to tax federal agencies, 516

agencies not taxed by congress, 516

Statutes, take effect when, 25

publication of, 25-'6

mode of enacting, 37-'8

different kinds, public and private, 38-'9

mode of proving, 38-'9

declaratory and remedial, 39

enlarging and restraining, 39

construction at common law, 39 to 41

construction in Virginia, 41 to 43

repugnant to constitution, 40

modifying charters or franchises, 503, 515, 535, 539, 578-'9, 584 to 588

Statutory guardians, 430-'31

Stewards, 188

Stockholders. See *Shareholders*.

Study, of law, utility to various persons, 2 to 10

causes of neglect at Oxford and Cambridge, 8 to 17

reasons for resuming it there, 17, 18

methods to facilitate, 18 to 21

Subjects to which common law relates, 31

Subordinate magistrates, 91 to 133

See *Magistrates*.

Subscription for shares in corporations, 528, to 531

Subsidy, 87

Successors, in corporations, 550-'51

Suffragan-bishops, 574

Suits, by and against husband and wife, 347 to 365

See *Actions*,

maintenance of between master and servant, 200, 201

between parent and child, 380

by and against corporations, where, 519-'20

capacity of corporations for, 555 to 562

**Suits—**

proceedings in, by and against corporations, 562 to 570

when corporation is plaintiff, 562 to 564

when corporation is defendant, 564 to 570

place of suit, 564

process employed, 565

serving process, 565 to 568

proceedings afterwards, 568 to 570

Summons, to parliament, 68

process against corporation, 565

*Superior respondeat*, 227-'8

Superintendent of poor, 123-'4

public instruction, 391. See *Education*.

Supervisors, of counties, &c., 123-'4, 133

Supreme magistrates, 68 to 90. See *Magistrates*.

Surveyors of highways, 112 to 121

antiquity and original, 113

appointment and removal, 114

fidelity secured, 114, 115

duties, 115 to 117

accounts for road fines, 116

Suspension, of *habeas corpus*, 61, 63

Syndics, 571

Tallage, 87

Taxation, of women, 371-'2

Taxes, only by consent of people, 59, 65

equal, uniform, and *ad valorem*, 65

direct to U. S. apportioned, 66

indirect to U. S. uniform, 66

modern in England, 87 to 90

for roads in Virginia, 115-'16

poor, 124

schools, 394

municipal, on corporations, 514-'15

on national banks, 515

on franchises of corporation, 515

State on federal corporations, &c., 516

federal, on State agencies, 516

exemption, conferred on corporations, 517

Tenants by *entireties*, 334

Tents, 86

Termination, of agency, 223 to 227

wardship, 434-'5, 471

Testamentary guardians, 430 to 431

supersede mother, when, 431, 434

give bond and security, 433-'4

*Testamentum inofficiosum*, 375

Testimonials, master to servant, 197-'8

Text-writers, early English, 32

Thanet, isle of, 46

Time, of corporate meetings, 528, 531

lapse of don't bar infants, 476

Tithing, in English counties, 49

man, 49

Tonnage, 88

Torts, to servant's, master's rights, 201-'2



## Torts--

- by servants, master's liability, 218 to 221
  - wilful and malicious, 220
- by servants, their own liability, 221-'2
- by wife, husband's liability, 345 to 347
- to wife's property or person, suit for, 349-'50
- by and to corporations, 558-'9
- Tourn, 111, 112
- Towns, 49
- Township, 93, 98, 101-'2, 103 to 105, 113, 116-'17. See *Magisterial District*.
- Tradesmen, 155
- Trading, of wife, with separate estate, 332, 333
  - of infant, 481
- Transfer of shares in corporations, 524, 554, 573
- Transportation, 53
- Traverse of office, 133
- Treasure-trove, 85
- Treaties, king's power to make, 81
- Tres faciunt Collegium*, 500
- Trespass *vi et armis*, for abduction of child, 401; of ward, 438
- Tribonian, 35, 36
- Triennial parliaments, 74
- Trusts, husband to wife, and *vice versa*, 292
  - direct from husband to wife, 293 to 295
  - of separation, husband and wife, 286 to 289
  - marriage settlements, 296, 297
  - for several jointly, cannot be alienated nor charged separately, 229-'30
  - liability of wife's trustee, 333
  - corporations seised to, 550
- Trustee, between husband and wife, 286 to 289, 292 to 297
  - liability of wife's, 333
  - corporation seised as, 550, 572
- Tutor, 422
- Twelve tables, laws of, 499
- Twenty-one, full age, 471
  - precise time of reaching, 472-'3
- Ubiquity, of the king, 82
- Ultra vires*, act of corporation, 549
- Under-sheriff, 96
- United States, safeguards of liberty in constitution, 62 to 67
- Universitates*, 500
- Universities, neglect of law-study in, 10 to 17
  - reasons for resuming it, 17, 18
  - courts of law in, 37
  - representation of in parliament, 71, 72
  - in Roman law, are corporations, 500
  - Greek and Roman, 500, 501
- University of Virginia, 389, 503, 579
- Unskilfulness of servant, master's liability, 219-'20
- Usage, effect on contract, 34

- Use, corporations seised to, 550 572
- Usury, forbidden to corporations, 539
  - not a defence to corporations, 539
- Vagrants, 127
- Valvasors, 155
- Valuable consideration, 529, 537
- Ventre inspiciendo*, writ *de*, 409-'10
- Veto-power, of king, 82
- Vicars, 152
- Vice-comes*, or sheriff, 49, 91. See *Sheriff*.
- Vidame, or valvasor, 155
- Viewers, of roads, 117, 120
- Vill, 49
- Villenage, 161
- Vinculo matrimonii*, nature of divorce, 254
  - causes of divorce, in England, 257 to 259, 261 to 266
  - in Virginia, 261 to 266
  - power of court in divorce, 269, 270
  - power of legislature in divorce, 270, 271
  - effect of divorce, 271 to 278
    - capacities of parties, 272, 275
    - legitimacy of issue, 272, 275
    - estates, 287-'8, 290 to 293, 273-'4, 276 to 278
- Virginia, military institute, public corporation, 579
  - university of, 389, 503, 519
- Viscount, 154
- Visitation, of corporations, 573, to 576
  - object of, 573
  - ecclesiastical corporations, 574
  - lay corporations, 574 to 576
    - eleemosynary, 574-'5
    - civil, 575
- Void contract, of infants, 484 to 486
  - marriages, 239, 241-'2
- Voidable contracts, of infants, 486 to 488
  - confirmation of, 488 to 495
  - marriages, 236, 239-'40
- Vouchers, for guardian's disbursements, 456-'7, 462
- Wages, liability of master for, to slaves, 169, 179
  - master's implied liability for, 189, 194-'5
  - forfeiture of month's, in case of *menial*, 190
  - case of entire contract, 190, 191
  - effect on, of servant's sickness, 191
  - recovery of, on dissolution of contract, 191 to 193
  - presumption of payment, 195
  - payment to infants, 195
  - set-off against, 195
  - father's right to infant child's, 376, 399, 400
  - mother's right to infant child's, 400
- Waifs, 85
- Wales, Prince of, 76
  - country of, 45

- Wapentake, 49  
 War, king's power to make, 81  
     revokes agency, when, 227  
 Ward of chancery, marrying, 428-'9  
     See *Guardian and Ward*.  
 Wardship, see *Guardian and Ward*.  
 Warrant, of commitment, 59  
     general prohibited, 63, 64  
 Weights and measures, 83  
*West Saxon lage*, 31  
 Wife, effect of divorce on property of,  
     273 to 274, 276 to 278  
     deeds of separation, 286 to 289  
     contracts of before marriage, 289 to  
     291  
     transactions with husband during  
     coverture, 291 to 295  
     will as to husband, &c., 295, 320  
     marriage settlements, 296-'7  
     ante-nuptial conveyances in fraud of  
     husband, 298  
     husband's interest in property of, 299  
     to 313, 370  
     interest of, in husband's property,  
     313 to 316  
     separate property, 316 to 333  
     tenant *by entireries*, with husband,  
     334  
     equity of, 306 to 310  
     ante-nuptial contracts, effect as to  
     strangers, 335, 336  
     contracts during coverture, as to h e -  
     self, 336 to 341  
     contracts during coverture, as to hus-  
     band, 341 to 345  
     maintenance by husband, 343 to 345  
     torts, husband's liability for, 345 to  
     347, 352, 358  
     crimes, her liability to punishment,  
     365-'6  
 Wife—  
     witness for or against husband, and  
     *vice versa*, 366-'7  
 Wight, isle of, 46  
 Wilful torts. of servants, 220  
 Will, husband to wife, and *vice versa*.  
     295, 320-'21  
     revoked by subsequent birth of child.  
     when, 379-'80  
     guardian, by, 404-'5, 430-'31  
     by infants, of personalty, 471  
     by infants, of lands, 486  
     husband cannot deprive wife of her  
     distributive share, by, 314  
 Wine license, 84  
*Wittenagemote*, 68  
 Witnesses, husband and wife, for or  
     against each other, 366-'7  
 Women, contrast with men as to rights,  
     &c., 367 to 373  
     crimes, 367 to 369  
     civil rights, 370 to 373  
     intestate property, 370  
     chattels, 370  
     lands, 371  
     taxation, 371-'2  
     chastity, 372-'3  
     reputation, 373  
 Words, of law, how expounded, 28  
 Wreck, 84-'5  
 Writ, *de custodia terre et heredis*, 438  
     *de ventre inspiciendo*, 409-'10  
     habeas corpus, 401, 439, 56 to 58, 61,  
     53  
     ravishment of ward, 401, 438  
     quo warranto, 93, 576, 583-4  
     mandamus, 575, 119  
 Year, meaning of, in statutes, 42  
 Year-books, 32  
 Yeoman, 155

## TABLE OF CASES CITED IN VOL. I.

Ableman v. Booth, 56	Att'y Gen'l v. Exeter, 503
Abbott v. Bailey, 338	“ Foundling Hos'l, 572, 575
Acton v. Pierce, 290	“ Clarendon, 584
“ Acton, 322	“ Scott, 524, 545
“ White, 328	“ Stewart, 548
Addison v. Gandassequi, 211	“ Turpin, 118
Adelphi Loan Asso'n v. Fairhurst, 346	“ Utica Ins. Co., 572
Adley v. Reeves, 555	Auditor v. Johnson, 227
Ailesbury v. Patteson, 28	Aughtie v. Aughtie, 274
Aiscough's Case, 410	Aurora City v. West, 540
Alebury v. Walby, 351, 352, 354-'5	Austin v. Sandal, 173
Alexander's Case, 93, 107	Aylett v. King, 463
Alexander v. Alexander, 207, 209	Ayray's Case, 513
Alfred v. Fitzjames, 169, 179, 189	Bark v. Andrews, 334
Allen v. Hart, 561	Baggett v. Menz, 328
Alley v. Rogers, 199	Baggs' Case, 526
Allison v. Banks, 202, 547	Bagwell v. Babe, 142
Allory v. Hotson, 226	Baker v. Hall, 306
Almond v. Almond, 282, 284	“ Lovett, 484, 487
Amherst Academy v. Cowes, 572	Bailey v. Bailey, 256, 260, 266, 268, 278,
Amor v. Fearon, 192	283
Anderson v. Anderson, 169	“ Griffith, 98
“ Commonwealth, 572	“ Ins. Co., 41
Andover T'pike Corp'n v. Gould, 522,	“ Poindexter, 168
530	“ Robertson, 200, 222, 461
“ “ “ Hay, 530	Bainbridge v. Pickering, 482
Andrews v. Askey, 372	Baird v. Bank of Washington, 544
“ Commonwealth, 506	Ball v. Ball, 399
“ Partington, 377, 378	“ Coutts, 322
“ Thompson, 443	“ Montgomery, 282, 310
Ankerstein v. Clarke, 351, 354.	Ballard v. Thomas, 97
Annandale v. Harris, 419	Ballow v. Talbot, 226
Ann Knee, <i>ex parte</i> , 416	Balt. & O. R. R. Co. v. Gallahue, 519,
Anonymous, 347, 361, 399, 475, 569	558, 561, 562,
Antelope, The, 177, 179	569
Antoni v. Wright, 24, 40, 65, 517	“ “ “ Harris, 518
Appleton v. Binks, 210, 211, 213	“ “ “ Wheeling, 581
Archer v. Colby, 306, 348	Baltimore & Susq. R.R. Co. v. Nisbet, 24
Armistead v. Waller, 461	Banbury Peerage Case, 411
Armstrong v. Stone, 57, 398, 402, 423,	Bank of Alex'a v. Patton, 433, 475, 552, 577
434, 439	“ “ Taylor, 39
“ Pitts, 330	“ of Auburn v. Weed, 556
“ Walkup, 449, 453, 455,	“ of Augusta v. Earle, 518, 519, 541,
456	550, 557
Arundell v. Phillips, 296	“ Commissioners v. Banks, 583
“ Phipps, 364	“ of Columbia v. Patterson, 522, 536,
“ Short, 301	543, 558
Ash v. Way, 374, 408	“ of Kentucky v. Wister, 579
Atkin v. Acton, 192	“ “ Lanier, 554

- Bank of Marietta v. Pindall**, 518, 540, 550  
 " of Metropolis v. Jones, 542, 546  
 " of North. Lib'a v. Cremon, 545  
 " of Old Dominion v. McVeigh, 65  
 " v. Poiteaux, 518, 522, 536, 548, 549, 558, 584  
 " of Poughkeepsie v. Abbotson, 506  
 " of Vicksburg v. Slocumb, 519, 557  
 " of Virginia v. Craig, 441, 459, 460  
 " of U. States v. Beirne, 207  
 " " Deveau, 498, 519, 557  
 " " Dana, 546  
 " " Dandridge, 525, 542, 544, 545, 558  
 " " Dunn, 542, 546  
 " " McKenzie, 579  
 " " Planters Bank, 503, 579  
 " of Watertown, v. Assessors, 515  
**Barbee v Barbee**, 280  
**Barber v. Dennis**, 185  
**Barber Surgeons v. Pelson**, 556  
**Barker v. Taylor**, 437  
**Barkedale v Finney**, 551, 552, 558, 577  
 " Neal, 566  
**Barlow v. Bishop**, 333  
 " Grant, 442, 443  
**Barnfather v. Jordan**, 341  
**Barnum v. Frost**, 437, 444  
**Barton v. Butler**, 191  
 " Briscoe, 327  
**Barzizas v. Hopkins**, 139  
**Bates v. Dandy**, 306  
**Bathurst v. Murray**, 429  
**Batty v Carswell**, 204, 208, 209  
**Baughner v. Nelson**, 24, 25  
**Baxter v. Baxter**, 256  
 " Benfield, 186  
**Bayard v. Morphew**, 238, 239  
**Baylis v. Dineley**, 487, 490  
**Beaston v. Farmers Bank**, 561  
**Beard v. Beard**, 294, 320  
 " Webb, 338  
**Beatty v. Lessee**, 688  
**Beanfort v. Berty**, 399, 431  
**Beaver v Lane**, 355  
**Beeby v. Beeby**, 255, 256, 257  
**Bell v. Bowen**, 196  
**Bennett v. Claiborne**, 442  
 " Davis, 319  
 " Toler, 421  
*Ex-parte*, 461  
**Ben. Mercer v. Kelso**, 169  
**Berks v. Dauphin Co.** 513  
**Berne v. Cahawba R. R. Co.** 530  
**Bernard v. Maury**, 198  
**Berrolles v. Ramsay**, 479  
**Berry v. Nevis**, 346, 360  
 " Usher, 379  
**Berston v. Collyer**, 180  
**Best v. Givens**, 491  
**Betty v. Horton**, 177, 178  
**Beverley v. Miller**, 483, 475  
**Bickerton v. Barrell**, 212, 213  
**Biddis v. James**, 39  
**Bidgood v. Way**, 349, 352, 353, 357.  
**Bilgerry v. Branch**, 142, 227  
**Billingsley v. Crickett**, 373  
**Binghampton Bridge**, 517  
**Bishops of St. David v. Lucy**, 574  
**Black v. Zacharie**, 554  
**Blackburn v. Edgeley**, 407  
 " Greaves, 350  
 " Scholes, 227  
**Blades v. Free**, 224, 225  
**Blakey v. Newby**, 306  
**Blanchet v. Foster**, 298  
**Blane v. Proudfit**, 206  
**Bletson v. Sawyer**, 294  
**Blewett v. Evans**, 173  
**Blight v. Rochester**, 147  
**Bloodgood v. M. & H. R. R. Co.**, 559  
**Blount v. Barrow**, 462  
 " Winter, 364  
**Bobo v. Hansell**, 490  
**Boggett v. Frier**, 54, 349, 353, 354  
**Boisseau v. Aldridge**, 379  
**Bolling v. Bolling**, 463  
 " Mayor of Petersburg, 120, 577  
**Bollman's Case**, 58  
**Bonham's Case**, 40  
**Booker v. Young**, 575  
**Booth's Case**, 40, 99  
**Borden v. Keverberg**, 338  
**Boston Bank v. Chambliss**, 49  
 " Glass Manufactory v. Langdon, 581  
 " Water-power v. Worcester R. R. Co., 587  
**Bostwick's Case**, 442  
**Bosvill v. Brouder**, 307  
**Boughton v. Frere**, 568  
**Boulton v. Crowther**, 579  
**Bourland v. Eidson**, 373  
**Bowden v. Taggart**, 447  
**Bowers v. Glendenning**, 447  
**Bowles v. Bengham**, 412  
**Bowyer v. Turnpike Co.**, 563  
**Boyce v. Tabb**, 174  
**Boyd v. Boyd**, 450, 453  
 " Oglesby, 447, 458  
**Bracken v. Wm. & M. Col.**, 504  
**Bradford v. Jenkins**, 173  
**Bradley v. Fisher**, 527  
 " The People, 516  
 " *Ex parte*, 527  
**Bradshaw v. Bradshaw**, 435  
**Bragdon v. St. Boat Wenonah**, 41  
**Branch v. Bowman**, 54, 136, 353  
 " Errington, 185  
**Brandon v. Robinson**, 327  
**Brashford v. Buckingham**, 349  
**Braxton v. Harrison**, 447  
 " Lee, 476  
**Bray v. Dudgeon**, 315  
**Brewer v. Harris**, 182  
**Briggs v Penniman**, 506, 554  
**Brinckenhoff v. Brown**, 581

- Briscoe v. Bank of Kentucky, 510  
 Bristow v. Eastman, 496  
 Britton v. So. Wales R. Way, Co., 559  
 Broadus v. Rosson, 441, 443, 446, 449  
 Bronson v. Chappell, 206  
     "    Kinzie, 25, 65  
 Brooker v. Scott, 480  
 Brooking v. Dudley, 474  
 Brooks v. Callaway, 373  
 Broughton v. Manchester W. Works, 541  
 Brown v. Armistead, 476  
     "    Carter, 407  
     "    Craig, 39  
     "    Clark, 317  
     "    McGrace, 223  
     "    McRae, 433, 475  
     "    Pocock, 329, 331  
     "    Powell, 327  
     "    Prest. Pen. Bank, 515-'16  
 Browning v. Headley, 278, 305, 306, 307, 308, 311  
 Bruce's (Lord) Case, 526, 527  
 Buck v. Wroten, 296, 317, 319  
 Buckles v. Lafferty, 200, 222, 461  
 Buckley v. Collier, 349  
 Buckridge v. Ingram, 551  
 Bullard v. Bank, 554  
 Bullock v. Sebrell, 182  
 Bunting v. Loppingwell, 233  
     "    —, 248  
 Burghart v. Angerstein, 479, 480  
 Burnett v. Hawpe, 315, 323, 326, 327, 328  
 Burr v. McDonald, 204, 522, 523, 525, 527, 532, 536, 537, 541, 543, 544, 546, 558, 559  
     "    Burr, 278  
 Burrell v. Jones, 210, 214  
 Burrill v. Nahant Bank, 542  
 Burwell v. Anderson, 463  
     "    Corbin, 475  
     "    Lumsden, 296  
 Bury's Case, 236  
 Butler v. Breek, 484  
     "    Butler, 378  
     "    Palmer, 580, 581  
     "    Rayland, 34  
 Cadaval v. Collins, 58  
 Cadogan v. Kennett, 296  
 Cage v. Acton, 274, 290  
 Caister & Aicles' Case, 181, 186, 187  
 Calder v. Bull, 63  
 Callo v. Brouneker, 192  
 Calvin's Case, 137, 138, 144, 146  
 Camanche, The, 539  
 Cameron v. Reynolds, 97  
 Campbell v. Campbell, 448  
     "    Gordon, 141  
     "    Leach, 207  
     "    Montgomery, 43  
     "    Mississippi Union Bk, 582  
     "    Walker, 461  
     "    White, 202  
 Cannam v. Farmer, 346  
 Cannell v. Burkle, 290  
 Canton v. Raynham, 39  
 Carew v. State, 25  
 Carpenter v. Simms, 120  
     "    Whitman, 398, 416  
 Carr v. Carr, 257, 260, 266, 268, 273, 278, 282, 283  
     "    Chapman, 463  
     "    Eserbroke, 310  
     "    Jones, 182  
     "    Taylor, 336  
 Carrington v. Goddin, 492  
 Carroll v. Blencore, 354  
 Carson v. Harris, 34  
 Carter v. Cutting, 446, 459, 460  
 Carteret v. Paschall, 306  
 Cartwright v. Vaudry, 418  
 Cary v. Bertie, 445  
 Castleman v. Holmes, 506  
 Catterall v. Kenyon, 346  
 Cathell v. Goodwin, 351  
 Catherwood v. Caslon, 233, 242, 243, 249  
 Cattin v. Bell, 98  
 Cavendish v. Fleming, 446, 458  
 Cecil v. Juxon, 333  
 Centre & K. T. P. Co. v. McConeby, 529  
 Chamberlain of London's Case, 555  
     "    v. Williamson, 253  
 Chambers v. Goldwin, 458  
 Chandler v. Grieves, 191  
 Chapple v. Cooper, 481  
 C. H. T. P. Co. v. Rutter, 559  
 Charles v. Charles, 315, 322  
 Charles Riv. Br. v. Warren Br. 582, 588  
 Charters v. Bayntern, 480  
 Chatham v. Audley, 458  
 Cheever v. Wilson, 279, 280  
 Chenango Mut. Ins. Co. *in re* 525  
 Chester Glass Co. v. Dewey, 545  
 Chew v. Justices, 93, 107  
 Chicago v. Robbins, 218, 228, 229, 239  
 Child v. Affleck, 197-8  
     "    Hudson's Bay Co., 553, 554  
 Childers v. Deane, 455  
 Chirac v. Chirac, 139  
 Cholmeley v. Cholmeley, 315  
 Christmas v. Russell, 280  
 Churchill v. Dibben, 323  
 City of Quincy v. Von Hoffman, 25  
     "    Richmond v. R. & D. R. R. Co., 503, 539, 579  
 Claridge v. Evelyn, 524  
 Clark's Case, 553, 555  
 Clark's Lessee v. Courtney, 211  
 Clarke v. Benton, 543  
     "    City of Washington, 545  
     "    Imper. Gas-Light Co., 537, 546  
     "    Mayo, 117, 120  
     "    N. J. St. Nav. Co., 562  
     "    Pistor, 328  
 Clarson v. Doddridge, 556  
 Clay v. Williams, 447  
 Claycomb v. Claycomb, 459, 460  
 Clayton v. Fawcett, 224, 544  
 Cleland v. Watson, 318  
 Clerk v. Tucket, 555

- Olignot's Champagne, 227  
 Clopton's Case, 40  
 Clough v. Beard, 449  
     "    Clough, 448  
 Coalter v. Hunter, 35  
 Coates v. Mayor of New York, 539  
     "    Wilson, 480  
 Cochran v. Islam, 209  
 Cockrell v. Barber, 458, 459  
 Cocksedge v. Cocksedge, 288  
 Coggs v. Bernard, 199  
 Colchester v. Seabar, 569, 577, 579  
 Cole v. Gower, 416  
 Coleman v. Lyne, 463  
     "    Moody, 44  
     "    Sarrel, 297  
 Collector v. Day, 516  
 College of Physicians' Case, 514  
 Collins v. America, 178  
     "    Evans, 226  
 Collis v. Blackburn, 378  
 Colt v. Bishop of Coventry, 523  
 Combe's Case, 185, 209, 210, 211, 213, 224  
 Commissioners v. Aspinwall, 540, 543  
 Commonwealth v. Aves, 178, 179  
     "    Birchitt, 576, 584  
     "    Bristow, 146  
     "    Edwards, 185  
     "    F. & M. Ins. Co. 582  
     "    Fox, 39  
     "    Gaskins, 24  
     "    Griffith, 176  
     "    Guardians, 526  
     "    Hewet, 24  
     "    James River Co. 575,  
         576, 584  
     "    Martin, 131, 132, 142,  
         145  
     "    Penn. Benev. Instit.  
         526  
     "    Selden, 131, 142  
     "    Sherrard, 93  
     "    St. Mary's Ch. 542  
     "    St. Pat. Soc. 526  
     "    Tate, 93  
 Compton v. Collinson, 338  
 Connecticut v. Jackson, 470  
 Conner v. Elliott, 142  
 Continental Ins. Co. v. Kasey, 212  
 Cook v. Darby, 202  
     "    Cook, 273, 278  
     "    Deaton, 479  
 Cooper, Countess of, Case, 295  
     "    Hepburn, 440  
     "    Martin, 378  
     "    Phillips, 196  
     "    Thornton, 404  
     "    Witham, 346  
 Coppin v. ———, 352'3  
 Corfield v. Coryell, 142  
 Corking v. Pratt, 407  
 Cornfoot v. Fowke, 226,  
 Corpe v. Overton, 494  
 Corry v. Corry, 407  
 Cothay v. Fennel, 215  
 Couden v. Clarke, 513  
 Coventry v. Woodhall, 185  
 Countess Cowper's Case, 295  
     "    Shrewsbury's Case, 198  
 Cowper, Countess of, Case, 295  
 Covington D. B. Co. v. Shepherd, 557  
 Cox v. Thomas, 96  
     "    Robinson, 39  
 Crabtree v. Bramble, 379  
 Craig v. Brown, 39  
     "    Leslie, 142, 145  
 Crawford v. Halstead, 43  
     "    Patterson, 330  
     "    Turk, 98  
 Crenshaw v. Delaplane, 34  
     "    Patterson, 117  
     "    Slate Riv. Co. 40, 64  
 Creuze v. Hunter, 399, 437  
 Crewe v. Crewe, 255  
 Croft v. Allison, 220  
 Cronie v. Hart, 293, 307  
 Crump v. Dudley, 298  
     "    Goddin, 40  
     "    U. S. Mining Co. 219, 521, 544,  
         564  
 Cullen v. Queensbury, 215  
 Culpeper Man. Soc. v. Digges, 513, 533,  
     568  
 Cuming v. Hill, 185  
 Cummings v. Missouri, 24, 40, 63  
 Cunningham v. Cunningham, 455  
 Curran v. Arkansas, 65, 511  
 Currie v. Mut. Ins. Co., 521  
 Curteis v. Kenrick, 323  
 Curtis v. Engell, 325  
 Dabney v. Taliaferro, 98  
 Dade v. Alexander, 311  
 Dayley v. Tolferry, 404  
 D'Aguilar v. D'Aguilar, 257  
 Dalrymple v. Dalrymple, 233, 242, 243,  
     248, 263  
 Dana v. Bank of U. States, 542  
 Dandridge v. Minge, 301, 306.  
 Danks v. Quackenboeth 25  
 Danville v. Pace, 539  
 D'Arcy v. Lyle, 197  
     "    Ketchum, 280  
 Darley v. Darley, 318, 378,  
 Darnall v. Smith, 327  
 Darrington v. Bank of Alabama, 511  
 Dartmouth, Col. v. Woodward, 275, 503,  
     503-4, 508, 520,  
     521, 535, 575, 579,  
     582, 585.  
 Davenport v. Nelson, 353  
 Davidson v. Atkinson, 319  
 Davies v. Thornycroft, 331  
 Davis v. Harman, 199, 448  
     "    Bank of England, 526  
     "    Maxwell, 193  
     "    Newman, 447  
     "    Spurling, 450  
     "    Tingle, 177  
 Davoux v. Fanning, 223  
 Dawson v. Dawson, 168,

- Dawson v. Godfrey, 247  
 Day v. Pargrave, 353  
     " Pickett, 24  
 Dean v. Brown, 333  
     " of Norwich Case, 512  
     " v. Pierce, 556  
     " Williams, 470  
 Deerly v. Mazarine, 338, 354  
 Dehan v. Rarey, 223  
 Dejarnette v. Allen, 312, 313, 348  
 DeLacey v. Antoine, 169  
 Delancey v. Taylor, 41  
 Delaplane v. Crenshaw, 34.  
 DeManneville v. DeManneville, 399, 402,  
     437, 439, 475  
 Dempsey v. Lawrence, 169  
 Dengate v. Gardner, 350  
 Desdoity, *Ex-parte*, 549  
 Dillard v. Tomlinson, 28  
 Dilliard v. Tomlinson, 446  
 Dillon v. Coppin, 297  
 Dodson v. Simpson, 441, 449  
 Doe v. Acklam, 135, 146, 148  
     " Miller, 512, 568  
     " Mulcaster, 146, 148  
     " Parratt, 334  
 Dold v. Geiger, 305, 307, 308  
 Dorr's Case, 58  
 Downer v. Morrison, 204, 206  
 Downes v. Glazebrook, 461  
 Dover v. Alexander, 418  
 Drake v. Beckhany 214  
 Draper v. Fulkes, 300, 346, 359, 360  
 Dred Scott v. Sandford, 139, 178  
 Drehman v. Stifle, 24  
 Drummond v. Sneed, 311  
 Drybutter v. Bartholomew, 551  
 Dubois v. Hole, 364  
     " Del. & Hud. Can. Co., 543  
 Ducarry v. Gills, 545  
 Ducat v. Chicago, 519  
 Dummer v. Chippenham, 570, 572  
 Duncan v. Surry Case, 559  
 Dundas v. Ellzey, 41  
 Dunlop v. Monroe, 228  
 Dunn v. Amey, 169  
     " Rector, 522, 536, 543, 544  
 Dunnington v. N. W. Road, 579  
 Dunston v. Barwell, 352  
 Dupree v. Cary, 314  
 Durant v. Durant, 256, 257  
     " Titley, 288  
 Durrett v. Davis, 428  
 Duval v. Craig, 210  
     " Malone, 24, 25  
 Dyer v. Dyer, 379  
 Eades v. Vanderput, 185  
 Earle v. Wilkinson, 545  
     " Wilson, 417  
 Early v. Wilkinson, 210, 214  
 Easley v. Craddock, 170, 183, 196, 377  
 East Ind. Co. v. Hensley, 209  
 Eckhols v. Graham, 296  
 Edmunds v. Brown, 538, 577  
 Edmundson v. Mitchell, 372  
 Edwards v. Van Bibber, 133  
 Edwin v. Williams, 306  
 Elder v. Elder, 178  
 Elliott v. Carter, 448  
     " Davis, 203  
     " Gurr, 236, 258  
     " Horne, 484  
     " Lyell, 24, 25  
 Ellis v. Marshall, 520  
     " Nimmo, 297  
     " Sheffield Gas Co., 218, 230  
 Ellibank v. Montolieu, 307  
 Ellison v. Ellison, 297  
 Elsee v. Gatewood, 199  
 Ellzey v. Hepburn, 41  
 Elvira's Case, 57  
 Emerson v. Prov. Hat Man. Co., 542  
 Emery v. Wase, 312  
 England v. Downes, 295  
 Essex v. Atkins, 322, 324  
 Evans v. Collins, 225  
     " Davies, 418  
     " Evans, 255, 256, 257, 260, 266, 285  
     " Massey, 417  
     " Pearce, 377, 379, 449, 455, 456  
 Evelyn v. Chichester, 479, 492  
 Eureka Co. v. Bailey Co., 522, 536, 558  
 Ewart v. Saunders, 199  
 Ewing v. Smith, 325  
 Eyre v. Shaftsbury, 401, 427, 431, 435,  
     438, 441  
 Fairfax v. Hunter, 145  
 Falls v. O. P. Augusta Co., 415  
 Farm. & Mech. Bk. v. Smith, 553  
 Farnsworth v. Garrard, 190  
 Faulkner v. Davis, 440  
     " Faulkner, 299  
 Fawcett v. Beavres, 346-'7, 359, 361  
     " Cash, 190  
 Fawcner v. Watts, 373  
 Feely's Case, 176  
 Fenn v. Harrison, 206  
 Fenner v. Taylor, 309  
 Ferneyhough v. Dickinson, 456, 458,  
     459, 460  
 Fernsler v. Moyer, 436  
 Fettiplace v. Gorges, 322  
 Ficklin v. Ficklin, 428  
 Field v. Evans, 328  
     " Farrington, 223  
     " Schiffelin, 440, 441  
 Fillieul v. Armstrong, 192  
 Finch's Case, 512, 513, 538  
     " Squire, 551  
 Findlay v. Findlay, 314, 315  
     " Smith, 44  
 Fiott v. Commonwealth, 133, 145, 147  
 Fisher v. Bassett, 441, 449  
     " Smith, 117  
     " Vanmeter, 98  
 Fitzgerald v. Jones, 457, 458  
 Fitzhugh v. Dennington, 473  
 Fitzpatrick v. Hearne, 173  
 Fleckner v. United States Bank, 522,  
     536, 543, 545, 546, 558



- Fletcher v. Ashby, 298  
     "    Fletcher, 288  
     "    Peck, 24, 40, 63, 579, 584  
 Foote v. Hayne, 252  
     "    Mayor of Truro, 524  
 Forbes v. Cochrane, 179  
 Ford v. Fothergill, 479  
     "    Phillips, 491  
 Foreman v. Murray, 442, 456  
 Forward v. Thamer, 168  
 Foster v. Foster, 178  
     "    Stewart, 185  
 Fowle v. Alexandria, 229, 559  
 Fowler v. Fowler, 322  
 Fox v. Comm'th, 39  
     "    Crosby, 438  
     "    Mackreth, 222, 461  
 Foxcroft's Case, 413  
 Franklin v. Franklin, 263  
 Franklin Glass Co. v. White, 530  
 Frazer v. Berill, 450  
 Freeman v. Fairlie, 458, 463  
 Frete v. Brown, 398, 400  
 Frontin v. Small, 210, 211  
 Frost v. Wolverton, 492  
 Fugate's Case, 93, 107  
 Fulcher v. Hunter, 39  
 Fulwood's Case, 95, 96, 263  
 Fulton Bk. v. N. Y. & Sharon Can. Co., 546  
 Gaines v. Spann, 431  
 Gallatin v. Bradford, 553  
 Galt v. Carter, 296  
 Gardner v. Ward, 146  
 Garforth v. Bradley, 310, 336  
 Garland, *ex parte*, 24, 40, 63, 527  
     "    Harrison, 420, 421  
     "    Loving, 440  
 Garrett v. Carr, 445, 455  
 Gaskins v. Comm'th, 24  
 Gelly v. Cleve, 165  
 Gelpcke v. Dubuque, 540  
 Genet v. Talmadge, 441  
 George v. Clagett, 217  
     "    Elliott, 170, 191, 193  
 Gentry v. Bailey, 314, 371  
 Gibbons v. Ogden, 40  
 Gilbert v. Fletcher, 184, 483  
 Gilby v. Copley, 556  
 Gill v. Shelley, 418  
 Givens v. Manns, 167  
 Goddin v. Crump, 40  
 Goodman v. Pocock, 193  
 Gordon v. Gordon, 417  
 Gore v. Knight, 322, 333  
 Gosden v. Tucker, 296  
 Gough v. St. John, 226  
 Governor & Co. v. Meredith, 587  
     "    Heirs v. Robertson, 145  
     "    "    v. Withers, 34  
 Gozzler v. Georgetown, 538-'9  
 Grace (Slave), 178  
 Graff v. Castleman, 449  
 Graham v. Londonderry, 295, 314, 315  
     "    Strader, 178  
 Graham v. Austin, 450  
 Grammar v. Nixon, 219  
 Gratz v. Redd, 531, 555  
 Granberry v. Granberry, 458  
 Gray v. Gray, 266  
     "    Portland Bank, 530  
     "    Turnpike Co., 520, 521, 531, 534, 555, 556, 563  
 Great West. R. R. Co. v. Blake, 511  
 Green v. Greenbank, 497  
     "    Hanbury, 447  
     "    Hopke, 216  
     "    King, 334  
 Greene v. Rutherford, 550  
 Greenwell v. Greenwell, 377  
 Gregory v. Baugh, 165  
     "    Marks, 300, 306  
     "    Paul, 338, 354  
     "    Pierce, 260  
 Gremeley's Case, 274  
 Griffin v. Macaulay, 529  
 Griffith v. Bird, 377, 379  
     "    Fanny, 177  
     "    Hood, 364  
 Grigsby v. Cox, 322, 324  
 Griswold v. Hepburn, 24  
     "    Waddington, 227  
 Guerrant v. Hocker, 299, 435  
 Gunn v. Barry, 24, 40, 65  
 Gunmaker's Co. v. Fell, 553  
 Gut's Case, 64  
 Gylbert v. Fletcher, 184, 483  
 Habergham v. Vincent, 379  
 Hagerstown T'pike Co. v. Green, 513  
 Haguenin v. Beuzeley, 407  
 Hakewell, *in re*, 402, 439  
 Hale v. Gerrish, 491  
     "    Wall, 142, 199, 227  
 Hall v. Hall, 437  
     "    Hollett, 461  
 Ham v. Ham, 427, 435  
 Hamlin v. Atkinson, 441, 444  
 Hampden Sid. Col. v. Legrand, 38, 522, 536, 543, 558  
 Hampshire v. Franklin, 580  
 Hampton v. McConnel, 280  
 Hamtramck v. Selden, 540,  
 Handley v. Snodgrass, 455, 463  
 Hands v. Slaney, 479  
 Hannah v. Boyd, 446  
 Harcum v. Hudnail, 301, 306  
 Hardin v. Fisher, 147  
 Harford v. Morris, 263  
 Harman v. Tappenden, 526, 572  
 Harnett v. McDougall, 328  
 Harrell v. Watson, 173  
 Harris v. Carson, 34, 432  
     "    Elliott, 120  
     "    Harris, 256  
     "    Hicks, 237  
     "    Jays, 544  
     "    Nicholas, 170, 220  
     "    Wall, 491  
 Harrison v. Fane, 480  
     "    Harrison, 551  
     "    Jackson, 203

- Harrison v. Worley, 495  
 Harrison Justices v. Holland, 40.  
 Hart v. Ten Eyck, 448  
 Hartford & N. H. R. R. Co. v. Crosswell, 530  
 Hartley v. Harman, 192  
     "    Wharton, 491  
 Hartshorne v. Whittles, 211, 545  
 Harvey v. Epes, 170, 196  
     "    E. India Co., 573  
     "    Skipwith, 311  
     "    Steptoe, 219  
 Harwood v. Oglander, 464  
 Haselinton v. Gill, 296  
 Hassell v. Long, 547  
 Hatch v. Taylor, 209  
 Hatchett v. Baddeley, 353, 354  
 Hawkesworth v. Hillary, 188  
 Hawkins v. Kemper, 40  
 Haxall v. Shippen, 301  
 Haycroft v. Creasy, 226  
 Hayden v. Gould, 242  
 Hayes v. Ewell, 311  
     "    Goode, 463  
     "    N. W. Bank, 562  
 Hazard v. Irvin, 226  
     "    Israel, 97  
 Head v. Briscoe, 346  
     "    Head, 411  
     "    Prov. Ins. Co., 545  
     "    Stamford, 335, 336, 361  
 Healey v. Rowan, 482  
 Hearle v. Greenbank, 323  
 Hedgeley v. Holt, 195, 480  
 Helyear v. Hawke, 227  
 Henderlite v. Thurman, 173, 174  
 Henriques v. Dutch W. India Co., 556, 557, 563  
 Henry v. Graves, 311  
 Hepburn v. Dundas, 167, 420, 421  
     "    Ellzey, 41  
     "    Griswold, 24  
 Herbert v. Herbert, 248  
     "    Tarbol, 473, 486  
 Herkimer M. & H. Co. v. Small, 531, 555  
 Hern v. Nicholas, 219, 225  
 Heron v. Heron, 407  
 Hervey v. Hervey, 207  
 Hewet v. Commonwealth, 24  
 Heygate v. Annesley, 306  
 Hibblewhite v. McMorine, 203  
 Higgins v. Senior, 211, 214  
 Highland T'pike Co. v. McKean, 531  
 Hill's Case, 105, 245  
     "    Manchester Water Works, 537  
     "    Saunders, 355  
     "    Turner, 406, 437  
 Hindley v. Westweath, 288  
 Hipkins v. Bernard, 456, 458, 459  
 Hite's Case, 133  
 Hobart v. Suffolk, 379  
 Hodge v. Combes, 206  
     "    First Nat. Bank, 206, 546  
 Hodgens v. Hodgens, 309  
 Hodgson v. Dexter, 213  
 Hodsden v. Lloyd, 323  
 Hoge v. Trigg, 97  
 Holden v. Holden, 256  
 Hole v. Railway Co. 230  
 Holland v. Holland, 256  
     "    Harrison Justices, 40  
     "    Malkin, 416  
 Holmes v. Latless, 25  
     "    Blogg, 494  
     "    *Ex parte*, 549  
 Holloway v. Headington, 297  
 Holt v. Clarencieux, 487  
     "    Ward, 233, 238, 250  
 Home v. Richards, 120  
     "    Rouse, 517, 539  
 Home of the Friendless v. Rouse, 517, 539  
 Homer v. Thwing, 497  
 Homestead Cases, 24, 40, 65  
 Honner v. Morton, 306, 311  
 Hookman v. Chambers, 353  
 Hooe v. Oxley 204  
 Hoop, The, 227  
 Hooper v. Royster, 442, 455, 456  
 Hope Ins. Co. v. Boardman, 557  
 Hopkins v. Blane, 206  
     "    Swansea Corp. 578  
 Hornsby v. Lee, 311  
 Horten v. Townes, 209  
 Hoste v. Pratt, 377, 378  
 House v. Chapman, 551  
 Houston v. Robertson, 224  
     "    Cantril, 224  
 Howard's, Sir Robert, Case, 472  
     "    Digby, 322  
     "    O. P. Powhatan, 414  
 Howell v. Maine, 349, 351, 357  
 Howery v. Helms, 200, 223, 461  
 Hubbard v. Goodwin, 132, 144, 145  
 Huddersfield Can. Co. v. Buckley, 527  
 Hughes v. Hughes, 377, 378  
     "    Edwards, 142, 147  
 Hull v. Hull, 406  
 Hulme v. Hulme, 260  
     "    Tenant, 317, 318, 325, 365  
 Hume v. Hoard, 323, 326  
 Hunt v. DeBlaquiere, 344, 345  
     "    Peake 487  
     "    Rousmanier, 223, 224, 227, 544  
 Hunter v. Coalter, 35  
     "    Fairfax, 146, 147  
     "    Fulcher, 39, 177  
     "    Lawrence, 223, 441, 449  
     "    Martin, 40  
 Hussey's Case, 401, 438  
 Huston v. Cantril, 544  
 Hutchinson v. York R. R. Co. 197, 221 222  
 Huttman v. Boulnois, 190  
 Hyde v. Price 353  
 Hylton v. Hylton, 457  
 Idle v. Cook, 419  
 Inglis v. Trustees Sailor's Snug. Harb. 135, 136, 146  
 Ingram v. Ingram, 209

- Inhabitants v. Strong, 513  
 Innis v. Wylie, 526  
 Instone v. Bridge Co. 531  
 Insurance Co. v. Francis, 519, 557  
     "    Bailey, 41, 99  
     "    Mahone, 212  
     "    Wilkinson, 212  
 Irwin v. Dearman, 372  
 Isaac v. Johnson, 169  
 Isbell v. Norvell, 170, 196  
 Island City *in re*, 539  
 Iveson v. Connington, 214  
 Jack v. Martin, 176  
 Jackson v. Bank of Marietta, 556, 563  
     "    Carpenter, 487  
     "    Claw, 249  
     "    Hartwell, 550, 572  
     "    Hobhouse, 327  
     "    Jackson, 378, 443, 455  
     "    Rose, 40, 176  
     "    Lamphire, 588  
     "    Rose, 40, 176  
     "    Turner, 476  
     "    Updegraffe, 449  
     "    Walsh, 543  
 Jacobs v. Commonwealth, 96  
     "    Hill, 96  
 James v. Biddis, 39  
     "    McCubbin, 97  
 James Riv. Co. v. Early, 578  
     "    Rogers, 559  
     "    Thompson, 64, 503,  
         535, 587  
     "    Turner, 64, 118  
 Jarman v. Woollaton, 296, 333  
 Jee v. Thurlow, 288  
 Jefferys v. Jefferys, 297, 378  
 Jenkins v. Dye, 407  
     "    Hutchinson, 216  
 Jennings v. Montague, 268  
     "    Rundall, 495, 497  
 Jenny v. Alden, 400  
 Jesson v. Collins, 243  
 Jincey v. Wingfield, 169  
 Johns v. Commonwealth, 516  
 Johnson v. Macon, 99  
     "    Freeth, 331  
     "    Pie, 497  
     "    Somerville, 506  
 Johnston v. Zane, 330  
 Joice's Case, 178  
 Joliffe v. King, 34  
 Jones' Case, 57, 460  
 Jones v. Carter, 210, 545  
     "    Goodchild, 419  
     "    Obenchain, 294, 297, 320  
     "    Van Zandt, 176  
     "    Williams, 458  
 Jordan v. Norton, 209  
 Jowett v. Charnock, 568  
 Judge's Case, 40  
 Kaine's Case, 58  
 Kaye v. Pienne, 338, 354  
 Keane v. Boycott, 184, 477, 488  
 Kearney's Case, 55  
 Kee v. Kee, 446, 447  
 Kelly's Case, 120  
 Kelly v. Scott, 274  
 Kemper v. Hawkins, 40  
 Kendall v. Lancaster, 488  
 Kennedy v. Gouveia, 210  
 Kevan v. Waller, 430, 431  
 Keyworth v. Hill, 346, 360, 361  
 Kilham v. Ward, 146  
 Killich v. Flexney, 461  
 Kinehart v. Kinehart, 407  
 King v. Amery, 584  
     "    Armesby, 181  
     "    Arundel, 184  
     "    Bedford Level, 544  
     "    Bellringer, 533  
     "    Billinghurst, 263  
     "    Bishop of Ely, 574-'5  
     "    Bridge, 524  
     "    Buller, 532  
     "    Cromford, 483  
     "    Delavall, 324  
     "    Devonshire, 533  
     "    Faversham, 532  
     "    Gaborien, 532  
     "    Greenhill, 402, 439  
     "    Hawkins, 524  
     "    Hill, 532  
     "    Hull Dock Co., 515  
     "    Isley, 402, 439  
     "    Joliffe, 34  
     "    Jones, 363  
     "    Langhorn, 532  
     "    Lynn Regis, 527  
     "    Mayor of Colchester, 523  
     "    "    of Gravesend, 542  
     "    "    of Liverpool, 560  
     "    "    of Norwich, 524  
     "    "    of Portsmouth, 527  
     "    "    of Stratford, 560  
     "    Mirfield, 515  
     "    Morris, 533  
     "    Mothersell, 563  
     "    Parry, 524  
     "    Pasmore, 520, 577, 578  
     "    Smith, 523  
     "    Stockland, 186  
     "    Teignmouth, 515  
     "    Thornton, 533  
     "    Whitwell, 584  
     "    Williams, 527, 523  
 Kingston, Duchess of, Case, 281  
 Kinnaird v. Williams, 314  
 Kinzie v. Bronson, 25  
 Kirkpatrick v. Love, 462  
 Kirkwall v. Kirkwall, 255  
 Knight v. Fox, 229  
     "    Knight, 329  
     "    Plymouth, 448  
 Korn v. Mutual Assurance Co. 538  
 Kruege v. Moore, 419  
 Lacon v. Briggs, 463  
 Lacy v. Osbaldistone, 192  
 Lafayette Ins. Co. v. French, 518, 541,  
     650, 557

- Lake v. Smith, 360  
 Lambe v. Milnes, 317  
 Lamburn v. Cruden, 192  
 Lampert v. Lampert, 364  
 Lampher v. Creed, 333  
 Lane v. Cotton, 227, 228  
     " Ironmonger, 345  
 Lange's Case, 58  
 Langford v. Gascoyne, 450  
 Lattess v. Holmes, 25  
 Laughner v. Pointer, 218, 220, 230  
 Lawrence v. McArtee, 486  
 Lean v. Shutz, 353, 354  
 Lee v. Bank of U. States, 323, 326  
     " Hodges, 202, 373  
     " Mynne, 351  
     " Prieaux, 319  
 Leftwich's Case, 57  
 Legal Tender Cases, 40, 24  
 Legard v. Johnson, 288  
 Legrand v. H. S. College, 38, 522, 536,  
     543, 558  
 Leland v. Wilkinson, 39  
 LeLoir v. Bristow, 195  
 Lemon v. Harnsbarger, 440, 474, 441,  
     444, 445  
 Lennard v. Robinson, 216  
 Le Vasseur v. Scrutton, 306  
 Levy v. McCartee, 43  
 Lewis v. Washington, 117  
     " Adams, 317, 318  
     " Babcock, 350  
     " Caperton, 301  
     " Fullerton, 167, 178  
     " Lee, 353  
     " Nicholson, 216  
     " *Ex parte*, 472  
 Liddesdale v. Robinson, 447, 457  
 Lifford's Case, 205  
 Lightfoot v. Colgin, 314, 370  
     " Price, 470  
 Lillia v. Airey, 325  
 Lilly's Case, 184  
     " v. Elwin, 192, 193  
 Lindsay v. Howerton, 456  
 Lionberger v. Rouse, 516  
 Listor's Case, 287  
 Lithgow's Case, 562  
 Liverpool Ins. Co. v. Mass'ts, 518  
 Livesay v. Helms, 300, 306  
 Lloyd v. Mason, 309  
     " Williams, 309  
 Loan Association v. Topeka, 41, 65  
 Lobdell v. Baker, 226  
 London & B. R. R. Co. v. Wilson, 530  
 London Dock Co. v. Sinnot, 535, 558  
 Louisville, C. & C. R. R. Co. v. Letson,  
     519, 557  
 Lowe v. Griffith, 479  
 Lucas v. Lucas, 294, 295, 319, 320  
 Luthel's Case, 514  
 Lyell v. Elliott, 24, 25  
 Lyle v. O. P. Ohio Co. 411, 412, 414  
 Lyme Regis v. Henley, 229  
 Lyon v. Jerome, 542  
 Lyons v. Blenkin, 399  
     " Martin, 220  
     " Miller, 215  
 Maberley v. Turton, 377, 378  
 Macbeth v. Haldiman, 213  
 Madrazo v. Willes, 173, 177, 179  
 Magor v. Lansley, 322  
 Mahone v. KeKule, 216  
 Malcolm v. O'Callaghan, 331  
 Male v. Roberts, 472  
 Malone v. Duval, 24, 25  
 Manly v. Scott, 342, 343, 344  
 Manhattan Ins. Co. v. Warwick, 142,  
     227  
 Mann's case, 93, 107  
 Manns v. Givens, 167, 169  
     " Commonwealth, 413, 414  
     " King, 208  
 Manning v. Napp, 419  
 Maria v. Kirby, 178  
     " Surbaugh, 168  
 Maria Louise v. Maret, 178  
 Marine Ins. Co. v. Hodgson, 546  
 Markham v. Guerrant, 330  
 Marlow v. Pitfield, 481  
 Marshall v. Balt. & O. R. R. Co., 519, 567  
     " Conrad, 146  
     " Rutton, 288, 338, 353, 354,  
         359, 360, 364  
 Martin v. Flowers, 211, 545  
     " Hunter, 40  
     " Mays, 490  
 Maryland v. McCulloch, 40  
 Mason v. Farmer's Bk., 566  
     " Moyers, 34, 432  
 Massey v. Parker, 329, 331  
 Mathewson v. Satterlee, 24  
 May v. Boisseau, 305, 349, 357  
     " State Bank, 562, 577  
 Mayhew v. Thatcher, 280  
 Maynard v. Firemen's Ins. Co., 559  
 Mayor of Carlisle v. Blamire, 514  
     " Colchester v. Seaton, 577  
     " Colchester's Case, 569  
     " Lynne v. Turner, 559  
     " Lynne Regis Case, 511, 513,  
         538, 562, 568  
     " Scarborough v. Butler, 514, 577  
     " Stafford v. Bolton, 568  
     " Workingham v. Johnson, 554  
 Mayor v. Gorry, 556  
     " Henléy, 229  
 McCall v. Peachy, 447, 455, 457, 458, 459  
 McCardle's Case, 58  
 McCartee v. Orphan Asylum, 292  
 McChesney v. Brown, 315, 323, 326, 327,  
     328  
 McClintic v. Lockridge, 57  
 McCormick v. McCormick, 313  
 McCracken v. Hayward, 65  
 McCulloch v. State Bank Maryland, 510  
     " Maryland, 40, 516  
     " Dawes, 446  
 McDaniel v. Brown, 98  
 McElwain v. Mudd, 173

- McGill v. United States Bank, 547  
 McGrath v. Herndon, 178  
 McLaren v. Pennington, 580, 582  
 McLean v. Longlands, 294, 295, 319  
 McManus v. Crickett, 220  
 McMath v. Johnson, 173  
 McMinn v. Richmond, 485, 486  
 McNamara v. Fisher, 353  
 McNielage v. Holloway, 300  
 McQueen v. M. Man. Co., 561  
 McWhirt's Case, 381  
 McWilliams v. Willis, 210, 215, 545  
 Meade's Case, 287  
 Meadows v. Duchess of Kingston, 281  
 Mechanics Bk. v. Bk. of Columbia, 211,  
     545  
     "    Seton, 546  
 Medley v. Horton, 328  
 Meems v. Hayworth, 226  
 Mellish v. DaCosta, 398  
     "    Mellish, 378  
 Mendez v. Mendez, 435  
 Mercer v. Gilman, 177, 178  
     "    Kelso, 169  
     "    Whall, 192  
     "    Watson, 24  
 Mercer Co. v. Hacket, 540, 543  
 Merchants & Fire Ins. Co. v. Grant, 490  
 Meredith v. Farr, 418  
 Metcalfe v. Clough, 223  
 Metham v. Devon, 417, 418  
 Meth. Episc. Ch. v. Jaques, 325  
 Metzzer's Case, 58  
 Meyer v. Muscatine, 540, 543  
 Micherson v. Easton, 487  
 Michie v. Michie, 105  
 Middlesex Husbandmen v. Davis, 521, 545  
     "    T. P. Co. v. Swan, 530  
     "    "    Walker, 530  
 Middleton v. Croft, 361  
     "    Case, 527  
 Milbourn v. Ewart, 290  
 Mildam Foundry v. Hovey, 536  
 Miller v. Holcombe, 447  
     "    Marshall, 109  
     "    Smith, 475  
     "    Trevillyan, 470  
 Milligan's Case, 58, 64  
     "    v. Wedge, 218, 229  
 Mills v. Duryea, 280  
     "    Graham, 496  
     "    Stuart, 506  
 Milner v. Harewood, 441, 482  
     "    Milner, 363  
 Minor v. Mechanic's Bank, 544, 547  
 Minot v. Curtis, 514  
 Mitchell v. Moore, 296, 317, 318  
     "    Reynolds, 553  
     "    Thornton, 117  
     "    Trotter, 447  
 Mitchinson v. Hewson, 336, 360, 362, 363  
 Mitford v. Mitford, 336  
 Mittelholzer v. Fullarton, 173, 179  
 Moffett v. Bickle, 359, 362  
 Moises v. Thornton, 537  
 Moloney v. Kennedy, 318  
     "    Moloney, 281  
 Montague v. Benedict, 343, 345  
 Monteith v. Commonwealth, 96  
 Montgomery v. Henry, 97  
 Moodalay v. E. Ind. Co., 504  
     "    Morton, 570  
 Moore's Case, 245, 247, 249  
     "    v. Dawney, 97  
     "    Ferguson, 322  
     "    Frowd, 457  
     "    Illinois, 174  
     "    Moore, 287, 328, 364  
     "    Thornton, 311  
 Morgan v. Morgan, 266  
 Morris v. Terrell, 208, 222, 224  
     "    Miller, 249  
     "    Morris, 459  
     "    Staps, 553  
 Morrow v. Peyton, 446, 450  
 Mortimer v. Mortimer, 256  
 Mortimore v. Wright, 376  
 Mosby v. Mosby, 96  
 Moseley v. Buck, 222  
     "    Moss, 373  
 Moses v. Stevens, 483, 487  
 Mountfort, *Ex parte*, 399  
 Mountstuart v. Mountstuart, 437  
 Moyers v. Mason, 34  
 Moyle Finch's Case, 513, 538  
 Muir v. Falconer, 118  
 Muller v. Bailey, 323, 324, 326  
 Mumma v. Pot. Co., 580  
 Munday v. Howe, 377, 378  
     "    Vawter, 296  
 Munford v. Rice, 96  
 Murphy, *Ex parte*, 525  
 Murray v. Barlee, 325  
     "    Charming Betsy, 135  
     "    Elibank, 307, 308, 309, 310  
     "    McCarty, 136, 142  
 Musser v. Thompson, 39  
 Mustard v. Wohlford, 487, 489, 492, 493,  
     494  
 Myers v. Wade, 377, 443, 446  
     "    Zetelle, 199, 448  
 Nabob of Carnatic v. E. Ind. Co. 504  
 National Bank v. Kentucky, 516  
     "    "    Comm'th, 515, 516  
 Needham's Case, 291  
 N. Binghamton T. P. Co. v. Miller, 567  
 N. Eng. Mar. Ins. Co. v. DeWolfe, 545  
 Nelson v. Baugher, 24, 25  
     "    Page, 447  
     "    Powell, 211  
 Nelthorp v. Anderson, 301, 350  
 Nesbit v. Balt. & Susqueh. R. R. Co. 24  
 Newby v. Wiltshire, 196  
 New Bedford T. P. Co. v. Adams, 530  
 Newburgh v. Bickerstaffe, 445  
 Newell's Case, 435  
 Newling v. Francis, 580  
 New Jersey v. Wilson, 585  
 Newton v. Ellis, 230  
     "    Hatter, 348, 351

- Newton v. Poole, 456, 457  
     "    Reid, 329, 331  
 Nicholas v. Squire, 429  
 Nichols v. Aylor, 35  
 Nicholson v. Bradfield, 535, 558  
 Nickell v. Handley, 330  
 Nickerson v. Easton, 483  
 Nimmo v. Commonwealth, 456  
 Nixon v. Rose, 318, 323, 326  
 Noke v. Windham, 475  
 Norfolk Overseers v. Bank of Va. 199  
 Norman v. Cunningham, 334  
 Norris v. Staps, 534, 556  
 North's (Lord) Case, 198  
 North Am. Coal Co. v. Dyott, 325  
 Northey v. Northey, 314  
 Norton v. Fazan, 343  
     "    Heron, 214  
     "    Turvil, 364  
 Nowlan v. Ablett, 180  
 Nurse v. Craig, 353  
 Oakes v. Hill, 534, 581  
 O'Bryan v. Knivan, 544  
     "    Ram, 336  
 Officer v. Sims, 174  
 Offley v. Warde, 556  
 Ogden v. Gibbons, 40, 587  
 Ohio & Miss. R. R. Co. v. Wheeler, 519, 557  
 Oliver v. Hundlet, 487, 488  
     "    Oliver, 260  
 O'Neale's Case, 249  
 Orme v. Orme, 281  
 Orr v. Hodgson, 139, 145, 147  
 Osborn v. Bk. of U. States, 510, 516, 543  
     "    Mobile, 517  
     "    Nicholson, 174  
     "    Taylor, 167, 169  
 Otway v. Otway, 260  
 Overton v. Freeman, 218, 229  
 Owen v. Dickinson, 325  
     "    Sears, 551  
 Owing v. Speed, 520, 563  
 Oxford, Earl's Case, 547  
 Packet Co. v. Clough, 212  
     "    McCue, 197, 221  
 Page's Case, 145  
     "    v. Bent, 226  
 Pallas v. Hill, 165  
 Palmer v. Stephens, 216  
 Parker v. Brooke, 319  
     "    Kett, 544  
     "    McCoy, 476  
     "    White, 328  
 Parramore v. Taylor, 41  
 Parks v. Ross, 213  
 Parry v. Hindle, 355, 356  
 Parsons v. Freeman, 379  
 Pasley v. Freeman, 198, 226  
 Pate v. McClure, 198  
 Patterson v. Ailesbury, 28  
     "    Gandassequi, 211  
 Paul v. Virginia, 519  
 Paup v. Mingo, 169  
 Pawson v. Watson, 225  
 Payne v. Coles, 462  
 Peacock v. Monk, 322, 323  
 Pearce v. Pearce, 475  
 Pearson *in re*, 402, 439  
 Peck v. Fletcher, 24, 40  
 Penn v. Spencer, 308  
     "    Whitehead, 323, 326, 333, 377, 400  
 Penniman v. Briggs, 582  
 People v. Chegary, 402, 439  
     "    Commissioners, 516  
     "    Landt, 398, 416  
     "    Mercelin, 399  
     "    Mercieu, 437  
     "    Moore, 484  
     "    ———, 399  
 Peppin v. Cooper, 544, 547  
 Perkins v. Bank of Hudson, 554  
     "    Bristol & R. T. P. Co. 583  
     "    Dickinson, 330  
     "    H. & C. Turnpike Co. 583  
     "    Kingston & M. T'pike Co. 583  
     "    Manhattan Co. 564, 582  
     "    Niagara Bank, 583  
     "    Runkle, 524  
     "    Trustees of Geneva Col. 518  
 Peshine v. Shepperson, 208  
 Pete v. Hague, 227  
 Peter v. Hargrove, 169  
 Peters v. Fleming, 479, 480  
 Phelps v. Prothen, 215,  
 Phil. & R. R. Co. v. Derby, 219  
 Phil. Wilm. & Balto. R. R. Co. v. Maryland, 519  
 Phillips' Case, 43  
     "    v. Bary, 508, 574  
     "    Evans, 173  
     "    Wickham, 524, 580  
 Phillips Academy v. King, 550, 572  
 Philliskirk v. Pluckwell, 351, 353, 355, 357  
 Phoebe v. Boggess, 169  
 Pickering v. Berah, 205  
     "    Stainford, 463-'4  
 Puckett v. Chilton, 317, 476  
     "    Day, 24  
 Pidgeon v. Williams, 199  
 Pierce v. Massenburg, 181, 404  
 Pigot v. Thompson, 556  
 Pinckard v. Woods, 441, 449  
 Pindall v. Bank of Marietta, 470  
 Plate Glass Co. v. Meredith, 579  
 Platner v. Sherwood, 54, 353  
 Pleasants v. Pleasants, 168, 169  
 Plymouth v. Throgmorton, 193  
 Poindexter v. Jeffries, 307, 308, 309  
 Polhill v. Walter, 216  
 Polyblank v. Hawkins, 312  
 Pomfret v. Ricroft, 205  
     "    Windsor, 445  
 Pool's Case, 57, 176  
 Pope v. Sale, 416  
 Popkin v. Popkin, 257, 260  
 Portland Bank v. Aythorpe, 516  
 Portmore v. Bunn, 551  
 Portsmouth v. Portsmouth, 238, 263



- Pottinger v. Rightman, 434  
 Potts v. Belt, 227  
 Poulson v. Justices, 93, 107  
 Poulterers' Co. v. Phillips, 534  
 Poulton v. Lattimore, 191  
 Powell v. Manson, 335  
 Prather v. Prather, 399  
 Pratt v. Taliaferro, 299, 301  
 Presb. Church v. Manson, 215  
     " N. York, 539  
 Prest. & Col. of Phys. v. Salmon, 511  
 Preston v. Hull, 204  
 Price v. Stokes, 450  
 Priest v. Cummings, 139  
 Priestly v. Fowler, 194, 196, 197, 221  
 Prigg v. Pennsylvania, 176, 179  
 Proctor v. Proctor, 255  
 Providence v. Clapp, 229  
 Prov. Bank v. Billings, 516, 587  
 Pulliam v. Johnson, 447  
 Pulvertoft v. Pulvertoft, 297  
 Pumpelly v. Green Bay Co. 64  
 Purcell v. Purcell, 249, 282, 284  
 Purdew v. Jackson, 311  
 Pusey v. Clemson, 458  
 Pybus v. Smith, 322, 324, 327, 328  
 Pyle v. Cravens, 486  
 Quackenbush v. Danks, 25, 65  
 Quarman v. Burnett, 218, 220, 229  
 Queen v. Millis, 233, 242  
     " Brightwell, 524  
 Rabone v. Williams, 217  
 Ragland v. Butler, 34  
 Railway Co. v. Allerton, 542, 546  
     " McMichael, 492  
     " Whitton, 519, 551  
 Railroad Co. v. Harris, 511, 519, 557  
 Raleigh & Gaston, R. R. Co. v. Reid, 517  
 Ramsey v. McCue, 98  
 Randall v. Rotch, 185  
     " Van Vechten, 543  
     " Wade, 495  
 Randleson v. Murray, 230  
 Randolph's Case, 58  
     " v. Hill, 170, 196  
 Rapson v. Cubitt, 218, 229, 230  
 Ratcliffe's Case, 423, 425  
 Raynor v. Grote, 212, 218  
 Raynham v. Canton, 39  
 Read v. Dunsmore, 192  
     " Read, 146, 147  
     " Snell, 315  
 Redford v. Peggy, 169  
 Reddie v. Railway Co., 229  
 Rees v. Conococheague Bank, 540, 556,  
     562, 563  
     " Rees, 278  
 Reeves v. Reeves, 255, 265  
 Reid v. Blackstone, 169  
 Revere v. Boston Copper Co., 581, 582  
 Regina v. Bailiffs of Ipswich, 527  
     " B. & Cr. Railway Co., 560  
     " Mayor of Ipswich, 527  
     " " Lincoln, 560  
     " Scott, 560  
     " Smith, 183  
 Regina v. Truebody, 527  
 Rex v. Albertson, 413  
     " Amery, 521, 582  
     " Andover, 526  
     " Armesby, 404  
     " Askew, 520  
     " Barebaker, 415  
     " Basey, 521  
     " Beneier, 407  
     " Birmingham, 239, 244, 403  
     " Blow, 184  
     " Bow, 187  
     " Bramley, 238-'9  
     " Cambridge, 521  
     " Chalk, 527  
     " Clarkson, 402, 439  
     " Closeworth, 180, 181  
     " Combe, 180  
     " Corporation Wells, 527  
     " Courtney, 524  
     " Cowles, 46  
     " Delaval, 402, 439  
     " Dempsey, 378  
     " Doncaster, 531, 532  
     " East Bridgford, 186  
     " Edingale, 180  
     " Faversham, 526  
     " Foster, 512  
     " Foxcroft, 524  
     " Gardner, 515, 539  
     " Guilford, 181  
     " Guildford, 526  
     " Hardwicke, 400  
     " Hawthorne, 580  
     " Hill, 531  
     " Hincksworth, 125  
     " Holland, 580  
     " Hughes, 521  
     " Johnson, 402  
     " Lady Partington, 53  
     " Leigh, 125  
     " Liverpool, 526, 531, 532  
     " London, 526, 569  
     " Ludbrooke, 191  
     " Luffe, 411, 413  
     " Lynn Regis, 526, 527  
     " May, 531, 532  
     " Mayor of York, 527  
     " Mayor of Andover, 527  
     " Mayor of Leicester, 527  
     " Martin, 563  
     " Miller, 580  
     " Morris, 580  
     " Moseley, 416  
     " Mountsorrel, 184  
     " Munday, 378  
     " Munden, 407  
     " Osborne, 580  
     " Pasmore, 580, 582, 584  
     " Poole, 524  
     " Richardson, 526, 527  
     " Rogers, 526  
     " Rotherfield Grays, 400  
     " St. Bartholomew, 515  
     " St. Luke's, 515  
     " St. Nicholas, 182



- Rex v. Saunders, 582  
 " Soper, 416  
 " Spencer, 553  
 " Staverton, 584  
 " Street, 415  
 " Smith, 196, 401, 402, 488  
 " Taylor, 527  
 " Thame, 527  
 " Thurston, 25  
 " Vice Chan. Cambridge, 520  
 " Wigston, 184  
 " Wilmington, 400  
 " Windham, 568  
 Rhea v. Gibson, 204  
 " Rheuner, 388  
 Rice v. Chute, 213  
 " Efford, 249  
 Rich v. Corkell, 295, 317, 319  
 Richards v. Richards, 357  
 Richardson v. Hall, 336  
 " Perkins, 98  
 Richmond v. Danville R. R. Co., 503,  
 539, 579  
 " Long, 227, 229  
 Richmond Enquirer Co. v. Robinson,  
 546, 547  
 Rich. P. & F. R. R. Co. v. Louisa R. R.  
 Co., 503, 579,  
 587, 588  
 " " " Richmo'd, 549  
 " " " Rich'd & D. R. R.  
 Co., 503, 539  
 " " " Sneed, 206, 546  
 Riddle v. Merrimac Locks, 520, 580, 582  
 Rider v. Union Factory, 552, 577  
 Ridgway v. Darwin, 462  
 " Hungerford, 192  
 Rigley v. Lee, 361  
 Ripley v. Sampson, 530  
 Rivanna Nav. Co. v. Dawson, 548, 549  
 Rives v. Farish, 173, 174  
 " State, 581  
 Roach v. Garner, 435  
 " Quick, 484  
 Roadcap v. Sipe, 347, 359, 360  
 Roanes v. Archer, 330  
 Robbins v. Chicago, 218, 230  
 Roburn v. Drummond, 215  
 Roberts v. Stanton, 433, 475  
 Robertson v. Read, 200  
 " Sharpe, 40  
 Robin v. Hardaway, 165  
 Robinson v. Cox, 39  
 " Pett, 457  
 " Scotney, 462  
 " *Ex parte*, 527  
 Rodney v. Chambers, 288  
 Roe v. Hervey, 473  
 " Hodgson, 441  
 Rogers v. Clifton, 198  
 " Rogers, 255, 446  
 Rondall v. Trimen, 216  
 Roper v. Wren, 322  
 Rose v. Jackson, 40  
 " Bowler, 352, 353  
 Ross v. Gill, 441  
 Ross v. Milne & *ux*, 217, 556  
 Rossiter v. Rossiter, 216  
 Roundtree v. Baker, 173-'4  
 Royster v. Leake, 96  
 Ruddle v. Ben, 169  
 Rumsey v. George, 349, 351  
 Runyan v. Lessee, 557  
 " Coster, 550  
 Russell v. Corne, 350, 352  
 " Lee, 487  
 " McLellan, 521, 545, 580, 581  
 " Men of Devon, 503  
 Rutland's Case, 584  
 St. John v. St. John, 255, 288, 289  
 St. John's Col. v. Bishop of Ely, 575  
 " " Todington, 553  
 St. Louis, The, 177  
 " v. Ferry Co., 518, 541, 550, 557  
 St. Michael v. Nully, 125  
 St. Savior's v. Bostock, 547  
 Salisbury v. Wilkinson, 463  
 Salmon v. Hamborough Co., 573  
 Salway v. Salway, 310  
 Sampson v. Goochland Justs., 120  
 Sangster v. Commonwealth, 97  
 Sangston v. Gordon, 204  
 Santissima Trinidad, The, 135  
 Sargeant v. Morris, 215  
 Satterlee v. Mathewson, 24  
 Saunderson v. Baker, 97  
 Saville v. Sweeney, 333  
 Sawney v. Carter, 168  
 Sawyer v. Corse, 228  
 Sayers v. Cassell, 456  
 " Wall, 319, 320  
 Sayre v. N. W. T. P. Co., 579  
 Schack v. Anthony, 556  
 Scherchardt v. Allen, 206  
 Schneider v. Heath, 225  
 Scholefield v. Eichelberger, 227  
 Scholey v. Mearns, 556  
 Schoonmaker v. Elmendorf, 351  
 Schuyler v. Hoyle, 306  
 Scott v. City of Manchester, 504, 229  
 " Gibbon, 318, 330  
 " Sandford, 139, 178  
 " Tankersley, 98  
 Scriven v. Tapley, 309  
 Seaton v. Benedict, 343, 345  
 Seagrave v. Seagrave, 364  
 Segar v. Edwards, 200, 222, 461  
 " Parrish, 195  
 Seins v. Bond, 217  
 Selden v. Overseers, 502  
 Sellen v. Norman, 195, 196  
 Senter v. Pugh, 120  
 Shanks v. Dupont, 135, 139, 145, 146  
 Sharon Can. Co. v. Fulton Bank, 511  
 Sharpe v. Robinson, 40  
 Sheats v. Selden, 42  
 Shelley v. Westbrooke, 398  
 Shelton v. Springalt, 376  
 Shepard v. Shepard, 294, 297, 320  
 Sheppard v. Starke, 386, 458

- Shepherd v. Lincoln, 228  
 Shepperson v. Shepperson, 292, 320  
 Sherrard's Case, 107  
 Shiels v. Blackburne, 198, 199  
 Shipbrooke v. Hinchinbrooke, 450  
 Shipley's Case, 526  
 Shipman v. Thompson, 224  
 Shrewsbury's Case, 198  
 Shue v. Turk, 168, 169  
 Shumate's Case, 40  
 Sidney v. Sidney, 364  
 Sillings v. Bumgardner, 440  
 Silver Lake Bank v. North, 518, 540, 550, 557  
 Simms v. Shaw, 378  
 Sims v. Bond, 215  
 Siter, &c., v. McClanachan, 301  
 Skinner v. Storks, 215  
     " *Ex parte*, 402, 439  
 Skyring v. Greenwood, 169  
 Slack v. Wood, 547  
 Slanning v. Style, 294 295, 320, 321  
 Slate Riv. Co. v. Crenshaw, 40  
 Slaughter's Case, 549  
 Slave Grace's Case, 178  
 Slee v. Bloom, 506, 553, 554, 580, 582, 584  
 Slocombe v. Grubb, 484  
 Sly v. Edgeley, 230  
 Smart v. Sanders, 223  
 Smith *ex parte*, 193  
 Smith v. Betty, 212  
     " Brown, &c., 165, 178  
     " Clay, 463  
     " Haywood, 192  
     " Moore, 210  
     " Smith, 178, 179, 318, 581  
 Smout v. Ilberry, 215, 224, 225  
 Society of Pract. Knowl. v. Abbott, 538  
     " for Propag. of Gospel v. New Haven, 584  
 Solly v. Rathbone, 209  
 Somerset v. Dighton, 398  
 Somerset's Case, 161, 178  
 Somerville v. Wimbish, 38  
 Sonley v. Clockmaker's Co., 550  
 Southby v. Stonehouse, 323  
 Souther's Case, 166  
 Spain v. Arnott, 192  
 Spear v. Crawford, 506  
 Spencer v. Champion, 581  
     " Ford, 282  
     " Pilcher, 170, 196  
 Spittle v. Lavender, 214  
 Spurling v. Rochfort, 309  
 Stackpole v. Beaumont, 429  
 Stafford v. Bolton, 512  
 Staffordshire Canal Case, 515  
 Stainback v. Bank of Va. 208, 223  
     " Read, 207  
     " Read & Co. 223  
 Stainforth v. Staggs, 416  
 Starke v. Ches. Ins. Co. 141  
 State v. Carew, 25, 65  
     " Bank of Maryland, 581  
     " Penney, 141  
 State v. Rives, 581, 583  
 Stayte v. Farquharson, 264  
 Steadman v. Poole, 328  
 Steamboat Wenonah v. Bragdon, 41  
 Stearns v. Taylor, 25  
 Stebbins v. Jennings, 509  
 Steedman v. Rose, 479  
 Steene v. Denny, 226  
 Stegall v. Stegall 411  
 Stephen's Heirs v. Swann, 145  
 Steptoe v. Read, 359, 362  
 Stephens v. Davison, 542, 554, 581  
 Stevenson v. Singleton, 168  
     " Nevinson, 569  
     " Sullivan, 420, 421  
 Stifle v. Drehman, 24  
 Stinchcomb v. Marsh, 210, 545  
 Stokes v. Upper Appomattox Co. 587, 588  
 Stone v. Wilson, 99  
 Stones v. Keeling, 374, 408  
 Story v. Livingston, 470  
     " Perry, 479  
 Stourbridge Can. v. Wheeler, 588  
 Strata Marcella, Case of Abbot, 580  
 Stracy v. Decey, 217  
 Strangways v. Robinson, 416  
 Strathmore v. Bowes, 298  
 Strawbridge v. Curtis, 519, 557  
 Stribling v. Bank of the Valley, 561, 562  
 Sturges v. Champneys, 308  
     " Corp, 322  
 Sullivan v. Sullivan, 266  
 Sutton's Hospital Case, 509, 511, 514, 534  
     " v. Cole, 572  
 Swaine v. Kennerly, 418  
 Swanzey v. Vanderhayden, 485  
 Swithin v. Vincent 346, 359, 363  
 Switzer v. Switzer, 288, 293, 320  
 Syme v. Butler, 213  
 Symmes' Case, 527  
 Tabb v. Archer, 482  
     " Harrison, 378  
 Taft v. Biewstat, 210  
 Talbert v. Jenney, 169  
 Talbot v. Jansen, 135, 136  
 Taliaferro v. Minor, 459  
     " Taliaferro, 306  
 Talley v. Starke, 440  
 Tanner v. Christian, 214  
 Tapp v. Lee, 198  
 Tappan v. Merchants Bank, 515  
 Tarble's Case, 56  
 Tar Riv. Nav. Co. v. Neal, 531  
 Taylor v. Ashton, 226  
     " Bank of Alex'a, 39, 518, 550, 557, 563  
     " Benham, 448  
     " Cullins, 168  
     " Delancey, 41  
     " Dulwith Hosp. 535  
     " Parramore, 41  
     " Stearns, 25, 65  
     " Yarborough, 299, 300, 311, 317, 318  
 Temple v. McLachlan, 190

Templeman v. Fauntleroy, 355, 462  
 Tennent v. Patton, 476  
 Terrett v. Taylor, 146, 502, 503, 535, 582, 584, 585  
 Thames. Tun. Co. v. Sheldon, 529  
 Theaker's Case, 410, 411  
 Thomas v. City of Richmond, 539, 540  
     " Genevieve, 178  
     " Mech. Bank, 562  
     " Roberts, 485  
     " Williams, 192  
 Thompson v. Bond, 216, 224  
     " Brown, 448  
     " Davenport, 211, 215  
     " Lamb, 461  
     " Lee Co., 540  
     " Musser, 39, 563  
     " Pac. R. R. Co., 516  
 Thomund v. Suffolk, 335  
 Thorndike v. Reynolds, 326  
 Thornton v. Gordon, 569  
     " Thornton, 334  
     " Winston, 314, 355  
 Thrift v. Hannah, 167  
 Tillotson v. Cheatham, 96  
 Timmings v. Timmings, 255  
 Tippetts v. Walker, 542  
 Tipping v. Tipping, 314  
 Todd v. Kerrick, 180  
 Tombigbee R. R. Co. v. Kneeland, 518, 541, 550, 557  
 Tomlinson v. Dillard, 28  
 Tompkins v. Branch Bank, 566  
 Tone Conservators v. Ash, 509  
 Topeka v. Loan Association, 41  
 Towles' Case, 138, 139, 141  
 Town of Paulet v. Olark, 509  
 Townes v. Lucas, 214  
 Townsend v. S. T. P. Co., 559  
 Townson v. Wilson, 416  
 Tremain's Case, 406, 437  
 Trent v. Cartersville Br. Co. 564, 588  
 Triplett v. Jameson, 458  
 Troy T. P. & R. R. Co. v. McChesney, 531  
 Trueman v. Hurst, 486  
 Truss v. Old, 440, 441  
 Tuckahoe Can. Co. v. Tuckahoe R. R. Co., 587, 588  
 Tucker v. Moreland, 493  
 Tullett v. Armstrong, 329  
 Tunstall v. Pollard, 446  
 Turner's Case, 166  
 Turner v. Lucas, 211  
     " Mason, 194  
     " Robinson, 190, 192  
     " Trisby, 481  
     " Turner, 474, 475  
 Turpin v. Lockett, 502  
 Turquand v. Royal Brit. Bank, 543  
 Turvil v. Aynsworth, 512  
 Tutt v. Lewis, 213  
 Tyree v. Donnally, 96  
     " Wilson, 96  
 Tyrrell v. Hope, 318  
 Udel v. Atherton, 219

Uhl's Case, 365  
 Union v. Wolsley, 213  
 Union Bank v. Beirne, 207  
     " Laird, 554  
 Union Pac. R. R. Co. v. Fort, 196, 197, 221  
 United States v. Amedy, 39  
     " Arredondo, 588  
     " Blakeney, 57, 484  
     " City Bank, 546  
     " Cottingham, 57, 484  
     " Kirkpatrick, 547  
     " Lipscomb, 58, 484  
     " McLemore, 470  
     " Nelson, 204  
     " Percheman, 47, 146  
     " Van Zandt, 544  
 U. S. Bank v. Amedy, 561  
     " Beirne, 207  
     " Dandridge, 521, 544  
     " Merchants Bank, 561  
 University of Oxford's Case, 573  
     " of Maryland v. Williams, 581  
 Van Allen v. Assessors, 516  
 Van Buren v. Digges, 191  
 Vance v. McLaughlin, 305  
 Vandervall's Case, 42  
 Vane's Case, 287  
 Van Valkenberg v. Watson, 377  
 Vasse v. Smith, 496, 497  
 Vaughan v. Jones, 440  
     " Rodes, 401  
     " Wilson, 306, 348  
 Veazie Bank v. Fenno, 66, 517  
 Veil v. Mitchell, 199  
 Vent v. Osgood, 484, 487  
 Vernon v. Keys, 198  
 Vicksburg & M. R. R. Co., v. Green, 173  
 Vidal v. Girard's Ex'or, 550, 572  
 Villa Real v. Mellish, 289, 434, 444  
 Vine v. Saunders, 347  
 Vintner's Co. v. Passey, 554  
 Virg'a Cent. R. R. Co. v. Sawyer, 230  
 Vizonneau v. Pegram, 322, 326  
 Von Hoffman v. City of Quincy, 25, 65  
 Wade v. Boxley, 311, 355  
 Waddy v. Hawkins, 458  
 Wagstaffe v. Smith, 322  
 Wainwright v. Bridges, 173  
 Wall v. Tomlinson, 306  
 Walker's Case, 199  
 Walker v. Page, 476  
     " Walker, 288, 289  
     " Wetherell, 443  
 Wallace's Case, 93  
 Wallace v. Taliaferro, 300, 306  
 Wallis v. Day, 179  
 Waller v. Armistead, 298, 407  
 Wallop's Case, 410  
 Walter v. Hodge, 294, 295, 320  
 Wamsley v. Lindenberger, 487, 488  
 Waukford v. Waukford, 291  
 Ward v. Sea Ins. Co., 581, 583  
 Waring v. Waring, 257  
 Warner's Case, 39, 249

- Warner v. McKay, 217  
 Warren's Case, 527  
 Warwick v. Mayo, 109  
     "    Bruce, 487  
 Wash'n University v. Rouse, 517  
 Water Co. v. Ware, 218, 229, 230  
 Watkins' Case, 55  
 Watkins v. Carlton, 374, 411  
     "    Hewlett, 416  
     "    Watkins, 290, 364  
 Watson v. King, 224  
     "    Lyle, 133  
     "    Mercer, 24  
     "    Rider, 281  
 Watts v. Cole, 433  
 Weald of Kent Can. Co. v. Robinson, 529  
 Weightman v. Washington City, 227-'8, 229  
 Weller v. Baker, 349, 352  
     "    Dippers, &c., 351  
 Wellesley v. Duke of Beaufort, 399  
 Wellford v. Chancellor, 223  
 Wells v. Nurse, 357  
     "    Winfree, 433  
 Wennall v. Adney, 196  
 Wescombe v. Dodds, 281  
 West v. West, 295, 318, 322, 323, 326  
 Westmeath v. Westmeath, 257  
 Weston v. Hunt, 502  
 West Riv. Br. Co. v. Dix, 587  
 West. Un'n Tel. Co. v. Richmond, 516, 562  
 Wharton v. Lewis, 252  
     "    McKenzie, 480  
 Wheatley v. Martin, 447  
 Wheaton v. East, 487  
 Whichcote v. Lawrence, 461  
 White v. Campbell, 373  
     "    Coleman, 117  
     "    Cuyler, 345  
     "    Hart, 65, 174  
     "    Johnson, 97  
     "    Verm't & Mass. R. R. Co., 540  
 Whitefield v. Lord Despencer, 227, 228  
     "    Hayes, 399  
 Whitehead v. Whitehead, 448, 453  
 Whiting v. Earle, 400  
     "    Rust, 323  
 Whitney v. Dutch, 487, 491,  
 Wightman v. Wightman, 259, 261  
 Wigmore v. Jay, 197, 221  
     "    —, 243  
 Wilbraham v. Snow, 300, 346, 359, 360  
 Wilcox v. Rowth, 491  
 Wilde v. Griffin, 416  
     "    Jenkins, 581  
 Wilks v. Bark, 210  
 Wilkinson v. Adams, 417, 418  
     "    Leland, 39  
 Willard v. O. P. Wood Co. 415  
     "    Stone, 487  
 Williams v. Moor, 485  
     "    Ogle, 512  
     "    Stonestreet, 189  
     "    Welsby, 203-'4  
     "    Williams, 399  
 Williamson v. Beckham, 323, 326  
     "    Coalter, 168  
     "    Paxton, 360  
     "    Watts, 485  
 Willoughby's Case, 409, 410  
 Wilmington R. R. Co. v. Reid, 517  
 Wilton v. Poindexter, 182  
 Wilson v. Brockley, 264  
     "    Ches. & O. R. R. Co. 511, 514  
     "    Fuller, 226  
     "    Peverley, 228  
     "    Spencer, 540  
 Wimbish v. Somerville, 38  
 Winstone v. Linn, 188  
 Wise v. Wilson, 188  
 Withers v. Governor, 34  
     "    Green, 190, 191  
 Witte, *Ex parte*, 402, 439  
 Wood v. Garnett, 453  
 Woodhouselee v. Dalrymple, 418  
 Woodman v. Chapman, 336, 362  
 Woodmas v. Mason, 537  
 Woodmeston v. Walker, 327, 331  
 Woodruff v. Trapnall, 511  
 Woodson v. Perkins, 296, 326  
 Woodward v. Newhall, 488  
 Woodyear v. Gresham, 336, 355  
 Worcester v. Eaton, 487  
     "    West Point R. R. Co. 516  
 Word's Case, 432, 433, 475, 476  
 Worrall v. Jacob, 288, 289  
 Wright v. Antoni, 24, 40  
     "    Deacon, 176  
     "    Wright, 398  
 Wrightman v. Wrightman, 261  
 Wroe v. Harris, 95, 96  
 Wych v. Meal, 570  
 Wyman v. Hallowell, 578  
 Wynne v. Thomas, 224  
 Yarborough v. Bank of England, 559  
 Yard v. Eland, 349, 351, 357  
 Yates v. Boen, 363  
 Yeaton v. Bank of Old Dom. 521, 579  
 Yerby v. Grigsby, 206  
     "    Lynch, 306  
 Yerger's Case, 40, 58  
 Young v. Peachy, 407  
 Zantzinger v. Gunton, 577  
 Zouch v. Parsons, 477, 483-'4, 485, 487, 488















